

# MISSISSIPPI LAW JOURNAL



**SYMPOSIUM: INTERNATIONAL TRADE**

**AN ANALYSIS OF THE OEO LEGAL SERVICES PROGRAM**

*Earl Johnson, Jr.*

**MISSISSIPPI'S EFFORTS AT INDUSTRIALIZATION:  
A CRITICAL ANALYSIS**

*Bill P. Joyner and Jon P. Thames*

*May 1967*

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**NUMBER 3**

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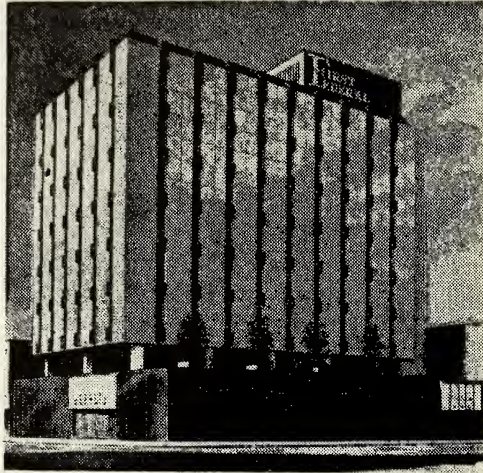
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---

## CONTENTS

### LEADING ARTICLES

#### SYMPOSIUM: INTERNATIONAL TRADE

|                                |     |
|--------------------------------|-----|
| <i>Stephen Gorove</i> .....    | 365 |
| <i>James M. Brown</i> .....    | 369 |
| <i>John H. Guttentag</i> ..... | 386 |
| <i>Dumond Peck Hill</i> .....  | 401 |
| <i>Andrew H. Power</i> .....   | 408 |

#### AN ANALYSIS OF THE OEO LEGAL SERVICES

|               |                              |
|---------------|------------------------------|
| PROGRAM ..... | <i>Earl Johnson, Jr.</i> 419 |
|---------------|------------------------------|

#### MISSISSIPPI'S EFFORTS AT INDUSTRIALIZATION: A CRITICAL

|                |                                             |
|----------------|---------------------------------------------|
| ANALYSIS ..... | <i>Bill P. Joyner and Jon P. Thames</i> 433 |
|----------------|---------------------------------------------|

### STUDENT COMMENTS

#### MISSISSIPPI'S CAMPUS SPEAKER BAN: CONSTITUTIONAL

|                                                        |     |
|--------------------------------------------------------|-----|
| CONSIDERATIONS AND THE ACADEMIC FREEDOM OF STUDENTS .. | 488 |
|--------------------------------------------------------|-----|

### STUDENT NOTES

#### CONSTITUTIONAL LAW—SYSTEMATIC EXCLUSION OF THE POOR

|                                                       |     |
|-------------------------------------------------------|-----|
| ET AL.: THE CHANGING NOTION OF EQUAL PROTECTION ..... | 508 |
|-------------------------------------------------------|-----|

#### CRIMINAL LAW—CRIMINAL RESPONSIBILITY IN THE

|                      |     |
|----------------------|-----|
| FEDERAL COURTS ..... | 513 |
|----------------------|-----|

#### INSURANCE—DISCLOSURE OF LIABILITY INSURANCE COVERAGE

|                               |     |
|-------------------------------|-----|
| AS GROUNDS FOR MISTRIAL ..... | 520 |
|-------------------------------|-----|

### RECENT BOOKS

|                  |     |
|------------------|-----|
| BOOK NOTES ..... | 526 |
|------------------|-----|

|                      |     |
|----------------------|-----|
| BOOKS RECEIVED ..... | 527 |
|----------------------|-----|

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## SYMPOSIUM: INTERNATIONAL TRADE

### BREAKING THE TRADE BARRIERS: LEGAL PROBLEMS OF INTERNATIONAL BUSINESS†

*Stephen Gorove\**

Trade and commerce with other nations has been one of the main incentives for human progress. From the earliest times of its history, transnational commerce developed within the context of the broader political, economic, social and technological environment. And so it is today in the 20th Century, a century of unequaled scientific advancement.

The world community of today is interconnected and the people therein highly interdependent. The barriers of earthly distance have practically vanished. Modern science has provided us with fabulous means of communication which go almost beyond the bounds of our belief. Inter-communications are instantaneous. Year by year the globe is growing smaller. While in the past it took weeks and months to travel from one part of the earth to another, today we can reach any part of the globe in less than a day. The news from almost any part of the world can be known and seen elsewhere on the very day, frequently at the very moment, it happens. We have a physical proximity for the first time in history. The changes that have taken place in our lifetime are but the aftermath of the industrial revolution and the direct result of ensuing rapid advances of the natural sciences.

With the help of the many miraculous inventions of modern science, contacts between the peoples of the world have multiplied enormously during the past few decades. The rise of international travel, international communications and investment has increased the dependence of individuals in all lands upon each other. A Londoner, for instance, may consume at a single meal Canadian flour, Danish eggs, New Zealand butter, French vegetables, Argentine beef, West Indian sugar and

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†This paper is an elaboration of the author's address before an Institute on "Breaking the Trade Barriers" which he chaired on May 5, 1966 at the University of Mississippi School of Law.

\*Professor of Law and Director of the Graduate Program in Law, University of Mississippi School of Law.

Colombian or Brazilian coffee. Moreover, when a certain price level changes in Wall Street, within the hour it will change in Calcutta. A thing like that we take for granted, but if we stated to Christopher Columbus that the time would come when the price of things in that India for which he was looking when he came across America would some day change within the hour of the change in price in the country which he discovered, he would probably have looked at us in great disdain.

Today a vast majority of states, particularly the developing nations, which roughly constitute three-quarters of the membership in the United Nations, attach vital importance to national control over trade and economic development. A number of states exercise various types and degrees of control for security considerations. While many of these controls constitute barriers to international commerce, the accelerated tempo of scientific advances and the ensuing shrinkage of the earth in terms of physical distances has brought about an unprecedented rise in the movement of people, goods and services across national boundaries. The result is that international and maritime practice is springing up even in places as remote from the oceans as the river cities of the heartland. Towboats and barges run up and down the Mississippi River like streetcars. Due to fast developments, our inland waterways are carrying more and more shipping and goods from far away places into the nation's interior. This activity in turn gives rise to international legal practice in places where nobody even heard of it before.

In addition to the ever-expanding private sector of international business, a whole new sphere has been opened up by the growth of public international financial and development agencies, by the great many public interstate transactions concerned with military and other supplies, and by the increasing commercial activities of government-owned enterprises in many countries.

There is no reason why Mississippi could not take its rightful share in the nation's trade with foreign countries. Not long ago, capitalizing on the advantages of geography and other unique potentials, a Mississippi trade mission to the European Common Market countries achieved over 3 million dollars worth of orders for Mississippi products. As a result of the trip, it was predicted that one firm alone would sell 10 million dollars worth of Mississippi products in Europe in about two or three years. Other trade missions have been exploring improvements in Mississippi's commercial contacts with some of our southern neighbors. The potentials and prospects of Latin-American economic integration within the next decade or two and the anticipated sharp increase in the standard of living of the region are expected to give a new and unprecedented impetus to trade with our Latin partners.

All these facts and many others which would take volumes to report are straws in the wind. They point toward increasing international contacts, travel and trade. They point to the need for adequate protection of the client's interests by services of lawyers familiar with the legal problems of international commerce and investment, the laws and procedures of foreign countries. In sum, the tremendous growth of international business activities during the past two decades and our expectation for the future has made the legal aspects of international transactions a subject of increasing concern to practitioners and law schools alike.

The legal problems arising out of the movement of people, goods and services across the national boundaries constitute a large and expanding order. It was only relatively recently that American legal education came to realize the importance of new subject areas to be included in the regular curricula of law schools. While these areas are generally identified by the terms "International Transactions," "International Business," "International Trade," they cover an ever-growing field which ranges from international antitrust problems to those of international financing, investment and trade.

The multitude of areas with which the lawyer may be concerned includes the delicate operations concerning the selection of a foreign lawyer, general orientation in relation to the laws, business opportunities, labor and other conditions and prospects in the foreign country. Knowledge of the various sources (public and private, domestic and foreign) where up-to-date and reliable information regarding such orientation may be obtained is a preliminary requisite. The lawyer's know-how must also encompass an understanding of the various ways by which investment into foreign countries can be financed through loans or other funds. The attorney must be able to advise his client regarding the best opportunities for such financing through public international organizations, as well as public and private organizations in the United States and foreign countries. He must be familiar with export-import regulations, and other restrictions, domestic and foreign, placed on transnational commerce, including antitrust and monopoly regulations, as well as limitations placed upon the repatriation of profits and currency convertability. He should have a thorough knowledge of the various types of licensing agreements, the tax aspects, and other special advantages or disadvantages of selecting a particular type of business enterprise in a foreign country. In addition, the lawyer must familiarize himself with the various kinds of investment guarantees available to protect his client's enterprise against undue risks and losses resulting from expropriation and other causes, and must acquaint himself

with international arbitration and other procedures for the settlement of disputes.

Most of a lawyer's work in international commercial transactions centers around the application of domestic, foreign, and frequently, of international law. But such work involves much more than the application of laws or the disentanglement of the legal labyrinth. To handle business problems with foreign countries successfully, one has to understand the people of the foreign country—their psychology, their living conditions, their business and trade customs. The successful lawyer in this endeavour must cultivate an international perspective, a knowledge of world conditions and trends. Today, with our ever increasing foreign contacts and world-wide interdependences, the lawyer of the international arena must not only have Solomon's wisdom, but Mercury's wings. To combine realism with idealism, patience with rapid efficiency and nationalism with internationalism is a mighty feat, yet this is what many lawyers in international practice are called upon to do.

The four papers reproduced on the ensuing pages aim to focus at some of the vital questions that lawyers and businessmen may have regarding the Mississippi region's interest in foreign trade, the most suitable organizations for foreign investment, the incentives, tax implications and prospects for such investment and many other problems. They attempt to answer some of the whys and wherefores of international business transactions.

## THE MISSISSIPPI BUSINESS MAN LOOKS TO LATIN AMERICA

*James M. Brown\**

This article will present a short summary of why Mississippi businessmen should be and are becoming more and more involved in Latin American markets and investments and, therefore, why Mississippi lawyers must add the dimension of proficiency in international business affairs to their counselling skills.

### I. GEOGRAPHICAL-ECONOMIC-HISTORICAL CONSIDERATIONS

The first and most obvious reason for Mississippi to look south in its quest for additional business contacts is geographical. A glance at maps of the American Hemisphere and of the major trade routes of the world will substantiate contentions that Mississippi occupies a unique location as a junction point for world trade. Just as New York, a century and more ago, became a natural hub through which goods and people passed in transit between an expanding new nation and the production centers of Europe, so does Mississippi today sit athwart what is rapidly becoming the main artery between the heartland of the United States, Latin America and other world markets. At least thirty states are more economically and directly accessible through the navigable waterways that empty into the Gulf than by any other means of bulk transport. The direct access ports of Pascagoula, Biloxi and Gulfport beckon trade moving not only in and out of the heartland states, but also to and from those rimming the intercoastal waterway. The cross-Florida canal will make this all-weather waterway even more vibrant with potential for Mississippi, for it will channel in trade from the coasts of Europe and Africa and the Mediterranean basin.

Mississippi has looked on herself as a land-bound agricultural unit, but the coming generation will see its mother state as a trade peninsula, even as much as Florida is a geographical peninsula. It is true that one of Mississippi's "peninsular coastlines" remains inchoate until the Tombigbee River project is completed. The delay of this project is largely due to lethargy compounded by the fact that the Atomic Energy Commission may have inherited for its stockpile of "futures" the timing of the decision to proceed with this project. International agreements prohibiting release of radioactive material to the atmosphere<sup>1</sup> could thereby reduce this project to a state of dormancy. For Mississippi,

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\*Associate Professor of Law, George Washington University School of Law.

<sup>1</sup>Treaty Banning Nuclear Weapon Tests in Atmosphere, in Outer Space, and Under Water, Aug. 7, 1963, 14 U.S.T. & O.I.A. 1313, T.I.A.S. No. 5433.

the completion of this project could add the spurt that would convert the already burgeoning corner of Tupelo and Corinth into a seaport mecca rivaling its counterpart in Memphis. In time similar projects would be capable of stretching across into Lake Erie and from Toledo to Michigan City, thus providing the Midwest industrial complex with an all-American short route access capable of year-round operations. Mississippi would then be bordered by water transport potential which could and must, if population trend projections are dependable, rival the commercial waterways of Europe. There is reason to believe that such a complex would appeal to many Great Lakes industrialists.

The all weather possibility can be a major asset. Our major competitive routes to the heartland market are the St. Lawrence Seaway and the rail-highway network<sup>2</sup> which connects New York to the Midwest. The Seaway must for the foreseeable future function under the handicap of an annual winter shutdown not only on the Canadian leg but on the long haul which practically circumnavigates Michigan. Once the ice breaks,<sup>3</sup> the Welland Canal still provides a bottleneck and the tremendous wasted mileage of the system itself, though still permitting economically feasible competition with rail traffic, cannot compete with the short trip up from the inviting southern entrance. The new Panama Canal and the cross-Florida canal will channel even more trade to those markets readily and easily reached by the southern route.

Mississippi cannot rest on geographical potential alone. In order to capitalize on her good fortune, she must get out and let the world know of the attractions she offers. It is true that Mississippi has had the benefit of some unsolicited advertising of a comprehensive nature in the last few years, but, as the old merchant tale goes, it is doubtful that they have always "spelled our name right." Nevertheless the world is aware of Mississippi as never before. As the story of the attributes that make Mississippi a great state is spread, and as other people become aware of the self-restraint, courage, and innate courtesy of the vast majority of Mississippians, and become aware of their great strides forward in the face of adversity and emotional testing, Mississippi's offering of friendly trade will be warmly received.

Mississippi must realize that it will take more than trade missions, sunshine, and mint juleps to acquire its potential. It will have to provide not only trade potential, but adequate handling and storage facilities specialized to rapid turnover and easy access to ultimate markets. Here

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<sup>2</sup>Completion of the interstate highway system will tend to offset this advantage. However, major access routes to such highways must be of modern design and be well maintained.

<sup>3</sup>N.Y. Times, April 8, 1964, p. L87, col. 1 stated that since its completion, April 8, 1964, was the earliest opening date of the St. Lawrence Seaway and that icing conditions still restricted traffic to daylight hours.

again Mississippi is fortunate, for it still has the capacity to build the most modern facilities conceivable, and the space to do so, space not yet so costly that it is only economically used when it supports floor upon floor of "cliff-dweller" daytime occupants.

There are already developments of significance that lead one to look to Mississippi as the logical hub of an economic region that encompasses all of Central America, most if not all of South America, the states lying between Denver and Pittsburg, and those bordering the Intercoastal waterway from Brownsville to Baltimore and Philadelphia. One such development is the pioneering that has been done in adapting port facilities to specialized cargo handling equipment, such as the banana-unloading operation at Gulfport. Such ingenuity and willingness to experiment successfully, uninhibited by the constraints of the older port cities built around wharves designed for sailing ships, is a basic essential. The experimentation in the Pascagoula shipyards<sup>4</sup> to perfect techniques in packaged-container and ship design are of great significance for the future. Such techniques will lead to the development of a new "Universal Piggy-Back" transport industry. Already experimented with by rail and truck combinations, the long-range package will undoubtedly have universal adaptability to shift from truckbed to flatcar to barge deck to specially designed ocean-going cargo ships, and finally, as a product of the Vietnamese war, to helicopter or other VTOL air transports. This last link will permit the creation of "New Town" developments in Latin America divorced from the prerequisite of slowly acquired, always inadequate roadbeds. Just as the railroad made possible the opening up of the Western half of the United States, so will the helicopter open up the vast undeveloped regions of Latin America, which will become ravenous markets, as well as exciting sources of new raw materials and finished products. Horace Greely today might well say "Look south, young man." It is not insignificant that the International Union of Operating Engineers has been quietly but busily organizing the helicopter pilots in recent months.<sup>5</sup> Mississippi Delta originated techniques in "drop-in" flying and specially adapted planes may have potentials far beyond their present trail-blazing applications

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<sup>4</sup>See, e.g., N.Y. Times, Jan. 4, 1966, p. 54, col. 1; *id.*, Jan. 28, 1966, p. 52, col. 4, dealing with Ingalls Shipyard at Pascagoula starting construction of first of five automatic cargo handling ships contracted by American President Lines.

<sup>5</sup>Riesel, *Inside Labor*, The Commercial Appeal (Memphis, Tenn.), Oct. 12, 1965, p. 8, col. 1-3: "[The I.U.O.E.] has, in the past few months, signed up over 500 helicopter pilots who are rapidly becoming a new section of the construction industry. . . . Today the big construction companies use the aerial threshers to lift huge and heavy equipment onto mountain tops, into inaccessible valleys, and even stretch it across rivers. . . . The Operating Engineers Union estimates that it will soon have thousands of 'copters' under its jurisdiction. . . ."

for crop control. Moreover, in this day of Telecom Satellites, with active international competition to produce the SST airplane for the next decade, the need to stack people like cordwood in order to operate a commercial-industrial complex with international spectrums no longer exists. Mississippi has space and a labor pool in transition from one basic economy to another. It could be a wonderfully pleasant place from which to take the future in hand.

Every day new potentials break into the news, bearing significance for Mississippi and for its potential trading associates in Latin America. Just recently a Pittsburg chemical firm discovered a process that permits formerly useless pine stumps to be converted into the essential ingredient for producing a low cost plastic foam "ideally suited to prefabricated forms that can be expanded into low cost housing."<sup>6</sup> Latin America and Mississippi both have need for low cost housing. Mississippi certainly is not at a loss for pine stumps. And we have not only the chemical industry potential, but some of the foremost industries in the building supply business,<sup>7</sup> with international contacts already established. Another imminent break-through is in the use of fish protein concentrate, which Secretary of the Interior Stewart Udall recently suggested could "correct nutritional deficiencies of two-thirds of the world's population."<sup>8</sup> The National Academy of Sciences has "endorsed the protein as safe, nutritious and wholesome and recommended that the Bureau of Fisheries build an experimental plant to produce 3000 tons of it for studies in the United States and abroad."<sup>9</sup> A recent news article comments, however, that in "order for fish protein concentrate to be marketed in the United States, which is the key to marketing abroad, the Food and Drug Administration would have to approve its use as a food additive."<sup>10</sup> The various research capacities at Mississippi State University and the University of Mississippi could be instrumental in successfully opening up this market for the Gulf Coast Fishing industry. Of prime importance to such efforts is the Institute of Agricultural and Natural Resources Law, directed by Dean Joshua M. Morse, III. One of the Tupelo business firms presently packages frozen fish dinners that are marketed throughout a large segment of the United States. If such a firm, assisted by the facilities and people at Mississippi State and at the University of Southern Mississippi, developed combinations of fish proteins that used vegetable oils and chemical processes to suit the

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<sup>6</sup>The Washington Post, April 2, 1966, p. F.13, col. 1,2.

<sup>7</sup>For example: International Paper Co., The Celotex Co., The Masonite Corp.

<sup>8</sup>The Washington Post, Feb. 16, 1966, p. A 13, col. 7.

<sup>9</sup>*Ibid.*

<sup>10</sup>*Ibid.*

culinary expectations of people in other lands, there would be no limit to its market. It is said that experiments are presently being conducted to attempt to prepare wheat kernels so that they look like, taste like, and cook like, rice, because people whose basic food has been rice for generations are reluctant to accept American style wheat as a substitute.<sup>11</sup>

Students of International Law will quickly see the significance of discussions relating to diversion of Canadian river waters from Hudson Bay to the Great Lakes,<sup>12</sup> and the resultant potential for additional release of water from the Lakes into the river systems of importance to Mississippi. Such a move has been said to carry a potential for increasing the minimum channel depth from 9 feet to 12 feet between the Gulf and Chicago. This would permit as much as one-third more cargo capacity for each barge unit traversing the Mississippi River without the necessity of increasing an already congested traffic pattern that will be increasingly burdened as Mississippi's stimulation of trade with Latin America becomes more effective. Mississippi, therefore, should be ably represented in any policy formulations leading to treaty negotiations affecting water levels in the Great Lakes region. Such negotiations could lead to major interchanges of trade between Mississippi and Canada. The Law School must play a major role by producing lawyers trained to appreciate and recognize the importance of such seemingly far away policy considerations by other nations. The Law School can serve as an invaluable source of legal research into solutions to existing barriers to satisfactory trade.

It is easy to ignore such areas of study when other needs are also pressing, and to delude oneself that other "bread and butter" items should come first. Those Mississippi farmers who suffered as the result of the "chicken war"<sup>13</sup> with the European Common Market, in which the Mississippi chicken farmer lost the market in which to sell his chickens, might well feel that this was a pretty solid "bread and butter" item. Such farmers, however, should expect to be better and more ably represented in future dealings with the Central American Common

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<sup>11</sup>Comments made at International Development Conference, Washington, D.C., March 22-23, 1966; see also N.Y. Times, Jan. 28, 1966, p. 52, col. 4; *id.*, Feb. 7, 1966, p. 12, col. 4.

<sup>12</sup>See generally N.Y. Times, Aug. 1, 1965, p. 44, col. 1-3; *id.*, Jan. 28, 1966, p. 52, col. 4; *id.*, May 23, 1964, p. 54, col. 4; *id.*, July 14, 1964, p. 69, col. 1; *id.*, April 18, 1964, p. 58, col. 5; *id.*, Nov. 1, 1964, § III, p. 7, col. 5.

<sup>13</sup>See, e.g., N.Y. Times, Nov. 17, 1962, p. 1, col. 5; *id.*, Feb. 6, 1963, p. 9, col. 8. For a comprehensive but concise treatment of the background, development, and resolution of the dispute, see Walker, *Dispute Settlement: The Chicken War*, 58 AM. J. INT'L L. 671 (1964).

Market<sup>14</sup> and with its larger but more loosely affiliated counterpart, LAFTA,<sup>15</sup> in South America.

It might have been advantageous for Mississippi to have been closely represented in the Kennedy Round GATT negotiations, but few people even know that GATT means General Agreements on Tariff and Trade, and that the Kennedy round was the third series of negotiations attempting to reduce the tariff barriers to increase trade in a sound, orderly, and timely manner.

In 1965 the Mississippi Marketing Council followed up its spring foray into Europe with a trade mission into Latin America.<sup>16</sup> Because the mission personnel were agriculturally as well as industrially oriented, both the U.S. Department of Agriculture and the U.S. Department of Commerce gave valuable assistance. Under the leadership of Governor Paul B. Johnson, and expertly guided by Mr. Gene Triggs and Mr. William Pyle, the success of the mission was a foregone conclusion. Products offered by the participating firms (all of whom paid their own expenses) included poultry, eggs, hatching chicks, pecans, canned vegetables, beef, pork, hams, lumber, roofing materials, asphalt products, chemical fertilizers, gas storage tanks, truck bodies, drilling equipment, farm machinery, and remanufactured construction machinery. Early sales amounted to \$1,245,000,<sup>17</sup> with expectations for several times that

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<sup>14</sup>Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica. The "Common Market" is a product of the General Treaty of Central American Economic Integration, signed December 13, 1960, at Managua, Nicaragua; text in *Multilateral Economic Co-operation in Latin America*, 1 U.N. Doc. No. E/CN. 12/621, at g (1962). See also Multilateral Treaty on Free Trade and Central American Economic Integration, signed at Tegucigalpa, Honduras, June 10, 1958; text in United Nations Report of the Central American Economic Co-operation Committee, Feb. 25, 1957-June 10, 1958 (Doc. E/CN. 12/CCE/151).

<sup>15</sup>Latin American Free Trade Association (referred to in Latin America as ALALC, Association Latinamerica de Libre Comercio) with a membership as of January 1, 1966, composed of Mexico, Ecuador, Columbia, Peru, Paraguay, Brazil, Uruguay, Argentina, Chile and Venezuela. This organization seeks to establish free trade among the member states by 1973, to balance their various import-export programs, to foster coordinated economic development, and to establish uniform treatment for goods, services and investments from outside. See Treaty of Montevideo, Protocols 1-5 and Resolutions Nos. I and II, Feb. 18, 1960 (official versions in Spanish and Portuguese). An unofficial English translation can be found in United Nations, *Multilateral Economic Co-operation in Latin America*, vol. I, Text and Documents (1962) at 57.

<sup>16</sup>The original trade mission to Europe was from May 16 to June 7, 1965, and the Latin American visit was in November. Both were officially sponsored by the United States Department of Commerce and designated as I.O.G.A. (Industry Organized-Government Approved) missions.

<sup>17</sup>MISS. MARKETING COUNCIL REP. ON OCT. 31-NOV. 13, 1965, TRADE MISSION TO LATIN AMERICA.

amount before the end of the year. This group made seventy-five calls in Venezuela, El Salvador, Guatemala, Panama and Puerto Rico.

One of the reasons that Mississippians have a capacity for success in such missions is the marked parallel in the economic development of Latin America with that of Mississippi. One strong similarity is that many of our neighboring nations are emerging from a one major crop economy and an agricultural society into an industrial-agricultural complex. Mississippi and Latin America have many problems in common and many similar goals and aspirations.<sup>18</sup> They can understand and help each other. They have many products and markets that can be complementary to each other. Among Latin America's problems is that of developing and retraining a largely unskilled, often illiterate labor force into a significant contributing factor in the developing country. Mississippi's developing know-how in this and other problem areas is one of its most exportable and needed assets, and carries a large envelope of good-will potential with it.

Mississippi's unsurpassed skills in using fertilizers, pesticides, and herbicides, in combating erosion, and in exploiting ground water provide a source of "know-how" which is essential if Latin America is to achieve necessary levels of self-sufficiency. University of Mississippi Law School Professor William Champion has done a tremendous amount of research into legal problems incidental to water resource use as a part of a national program in which Mississippi State University also plays an important part.

The complementary nature of Mississippi and Latin American raw materials, industrial and production skills and market needs lends itself to concepts of a comprehensive and interrelated market area and distribution system, and its essential ingredient, a multi-disciplinary study and professorial exchange program. The University of Mississippi is fortunate in having as a member of its faculty Dr. Pedro C. M. Teichert, one of the nation's experts on such matters, as his book *Economic Policy Revolution and Industrialization in Latin America*<sup>19</sup> well demonstrates. Another prime asset is the Graduate Division of University of Mississippi Law School, which Dean Morse has created and shaped to accommodate the legal end of such a program. His pioneering should be actively supported and expanded throughout the university system of the state.

A connected asset is the pilot project given perspective last year by a member of the International Business Transactions class, William C.

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<sup>18</sup>See generally Herring, *A HISTORY OF LATIN AMERICA*, (2d ed. 1961); Hanke, *SOUTH AMERICA* (1959); and Hanke, *MEXICO AND THE CARIBBEAN* (1959).

<sup>19</sup>Teichert, *ECONOMIC POLICY REVOLUTION AND INDUSTRIALIZATION IN LATIN AMERICA* (1959).

Denton, working under a grant arranged by Vice-Chancellor Bryant. Mr. Denton set out to catalog the present whereabouts of an entire generation of Central American high school and college students who have come to Mississippi year after year, at their own expense, without fanfare or exploitation, to take part in the educational advantages and facilities of this state. Such people have returned home as firm friends of Mississippi, sending their friends and children in turn, to live and study with us. It is time specific recognition is given to these graduates of Mississippi's educational systems, and these friendships are renewed and expanded to our mutual advantage.

## II. TRENDS INDICATED BY STATISTICS

Few people are aware of the constantly increasing amount of trade between Mississippi and Latin America. The latest comparative figures available are for the period 1960 to 1963.<sup>20</sup> In 1960 total exports of manufactured goods from Mississippi amounted to 77.0 million dollars. Twenty-one and four-tenths million dollars of this originated in the Fourth Congressional district.<sup>21</sup> By 1963 Mississippi's exports in this category had risen to 101.9 million dollars, an increase of over 34 percent in three years. In foods and kindred items during the same period, Mississippi gained 30 percent to 17.0 million dollars. Textile mill products gained 100 percent. Lumber and related products gained 33 percent to 6.5 million dollars, while chemicals and allied products went up 36 percent to 11.1 million dollars. In 1960 the Departments of Labor and Agriculture estimated that 26 percent of Mississippi farm workers were producing products that were exported.<sup>22</sup> Other products exported were door closers, component parts for conveyor systems, tele-communications systems and equipment, electric organs, air conditioning and refrigeration equipment, navel stores of all kinds, hydraulic equipment, farm equipment, aluminum windows, aluminum and stainless steel household appliances, fork-lift trucks, tires and tubes, cat and dog food, toys, oilfield machinery, nitrogen, urea and ammonium phosphate fertilizer products.<sup>23</sup>

In the first quarter of 1966 approximately 22,000 dollars worth of men's jackets were shipped from the Corinth region to Venezuela; more

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<sup>20</sup>U.S. Dep't of Commerce, *Current Industrial Report Series* M161(63)-1, Table I at 2-5.

<sup>21</sup>U.S. Dep't of Commerce, *Export Origin Study, State of Mississippi, 1962*, at 7; U.S. Dep't of Commerce, *Export Origin Study, Mississippi Fourth Congressional District, 1962*, at 7.

<sup>22</sup>U.S. Dep't of Commerce, *Export Origin Study, State of Mississippi, 1962*, at 7.

<sup>23</sup>*Id.* at 8.

than 72,000 dollars worth of filtering clay moved from Jackson to Brazil; 19,000 dollars worth of soybean oil moved from Marks to Honduras; and 67,000 dollars worth of woodpulp traveled from Natchez to Columbia.<sup>24</sup> A glance beyond Latin America during this same period would show that in 1965 Yazoo City shipped more than 3,700,000 dollars worth of ammonium phosphate to India; Kosciusko did more than 400,000 dollars worth of business in vehicle parts and buses sold in Tunisia and Guinea; Stonewall sent 18,000 dollars worth of denim products to Morocco.<sup>25</sup> International trade is a vital part of the Mississippi economy today, and it will continue to play an increasingly important part. As Mississippi expands its trade horizons, the legal advice that is essential to any successful business venture must also take on new dimensions. It is imperative that Mississippi train more lawyers who can follow the lead of such people as Professor E. P. Connell of the University of Mississippi Law School, and the internationally respected Mr. David Cottrell of Gulfport. There is not a community in Mississippi today that can afford to be without at least one lawyer who has a beginning capacity for counselling clients engaged in transnational business affairs. In this day of rapid transit and instantaneous communications it is foolish to contemplate business limitations composed of national boundaries that arbitrarily cut off more than fifty percent of a natural market area.

There is another reason of perhaps more important significance for Mississippi to reach farther afield. Mississippi has unique skills that are perhaps more essential today than ever before in man's history. A brief recounting of some startling information presented by Mrs. Dorothy Jacobsen, Assistant Secretary for Agriculture, to the International Development Conference in Washington, on March 23, will best set the stage for Mississippi's important role in world affairs.<sup>26</sup> Mrs. Jacobsen discussed the world's present population explosion and the problems of producing sufficient food to keep pace. She said that in India, until two years ago, there was an average of 10 million cases of malaria per year, with an average of 1 million resulting deaths annually. Two years ago a vast malaria control program was inaugurated. Last year there were only 70,000 cases and no deaths. This factor alone increases the existing population of India by one million people per year.

Mrs. Jacobsen presented statistics to support the inference that if the food surplus nations of the world begin to put back into production all arable land with a goal of reaching maximum potential production

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<sup>24</sup>Letter and enclosures from William C. Gibbons, Director and Congressional Liaison of the Dep't of State Agency for Int'l Dev. to Representative Prentiss Walker, May 2, 1966, on file in George Washington University Law Library.

<sup>25</sup>*Ibid.*

<sup>26</sup>International Development Conference, Washington, D.C., March 22-23, 1966.

of protein grain foods, and if such production is continued for the next 20 years while the sixty-six food importing nations of today continue to increase their productivity at existing rates, we will nevertheless reach a situation, somewhere between 1984 and 1987, in which the total food production of the world cannot prevent massive famine and catastrophe because the world simply will have fallen behind in its capacity to feed itself.<sup>27</sup> The only apparent solution to this dilemma is to help those food importing nations to learn to produce sufficient food to meet their own demands. One of the essentials for such a program is know-how of the type plentiful in Mississippi. One of our exportable products most in demand is people with the capacity to demonstrate and prove, in the "Ugly American"<sup>28</sup> pattern, how to do it. Such ambassadors need the capacity to understand the problems inherent in an emerging economy. They need to be people who have already dealt with and solved or brought within manageable proportions the many transitional disruptions that occur. Some of our Delta farmers are even now making such contributions in Mexico and Honduras.

Secretary of Agriculture Orville Freeman, addressing the same group<sup>29</sup> the day before Mrs. Jacobsen's presentation, recounted that today there are 1 billion people in the world who are undernourished and another billion who are borderline. Only the remaining one-third is adequately fed. He said the Agricultural Trade Development and Assistance Act of 1954<sup>30</sup> resulted in 145 million tons of food being distributed at an expenditure of 15 billion dollars. Mr. Freeman stated that after distributing this food we were farther behind in terms of food available in relation to the amount of food required than before its distribution. Thus, the current foreign aid programs are being geared to the concept of "self-help." It has been said that 1 million dollars will provide food for 70,000 people for one year, but that the same amount spent for fertilizer will provide food for 200,000 people for one

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<sup>27</sup>"Without a rapid increase in food output, the [food] deficit [of the less developed countries] will rise to 88 million tons by 1985. A shortage of this size would be disastrous." Dep't of State Agency for Int'l Dev. Summary Presentation to the Congress on Economic Assistance Programs proposed for fiscal year 1967, at 2.

<sup>28</sup>BURDICK & LEDERER, *THE UGLY AMERICAN* (1958).

<sup>29</sup>Address by Secretary of Agriculture Orville Freeman, International Development Conference in Washington, D.C., March 22, 1966. Mr. Freeman stated that the one billion people who are "overfed" are targets for the revolution of rising expectations of the two billion who are now undernourished or nearly so, and that no economic changes can take place in undeveloped agricultural countries until the agricultural situation itself vastly improves. He stated that one major need is for a vast investment in technology for sound agricultural programs.

<sup>30</sup>Agricultural Trade Development and Assistance Act of 1954, 68 Stat. 454.

year.<sup>31</sup> Statistically this is undoubtedly true, but those who have seen the Delta under cultivation know that it takes the proper combinations of fertilizers, applied at the right times, by the right methods, under the right conditions, and with the right distribution patterns and ratios before the desired results can be reasonably assured. Perhaps along with our boatloads of fertilizers we should send some well trained farm managers who can help entire villages or regions to raise themselves to a level of nutritional survival. There is no good reason why we cannot at the same time bring people from these other lands to our universities to learn our techniques and to pass on to us their own experiences and knowledge.

One item in the 1967 A.I.D. program<sup>32</sup> is support for educational assistance of a bi-national nature for such purposes as outlined above. The 1967 program proposes to invest about 512 million dollars in programs to speed agricultural growth.<sup>33</sup> Most of this money will be geared to self-help programs, and nearly one-third of the amount planned for agricultural assistance is allocated to fertilizer.<sup>34</sup> Other money is designated for irrigation and water resources, for initial financing of farm credit systems, and to equip farm-related industries, such as plants to produce insecticides and farm machinery. More technicians will be trained and sent abroad to help improve and expand agricultural extension and research in less developed countries. Scholarships will be provided for Latin American students to come here and study. Efforts will be made to provide legal research to help unsnarl the land registration systems which are at present a major barrier to sound taxation and land distribution.

It is doubtful that any state can contribute more or benefit as much from such programs as the State of Mississippi. It will take ingenuity and skill, and in every venture the lawyer will be found guiding his businessmen clients through an increasingly complex maze of business procedures, administrative controls, tax considerations, and governmental participations of all sorts. The law school at the University of Mississippi, through the foresight of Dean Morse and his faculty, has created a structure that is ideally suited to train lawyers of tomorrow and to add dimensions to the skills of the practicing bar, so that the challenge of the natural market for the State of Mississippi will be well met.

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<sup>31</sup>Dep't of State Agency for Int'l Dev. Summery Presentation to Congress on Economic Assistance Programs proposed for fiscal year 1967, March 20, 1966, at 3.

<sup>32</sup>*Id.* at 6-7.

<sup>33</sup>*Id.* at 3.

<sup>34</sup>*Ibid.*

## III. SOURCES OF ASSISTANCE AND ADVICE

In addition to looking beyond the horizons, the various sources of information and help available to the lawyer with a client interested in overseas investments and business transactions should be considered. For competency in working with them, of course, a serious effort is required. But even a limited checklist can be an important initial tool with which to start your inquiry.

For sources of information readily available, in and near Mississippi and related specifically to Mississippi's problems, first turn to the Mississippi A & I Board and its Marketing Council. In addition contact the Memphis Regional Office of the U.S. Department of Commerce. It can provide a tremendous amount of invaluable assistance, and Department publications, such as the *OVERSEAS BUSINESS REPORTS* which contains basic information and economic data on the various nations, and the weekly publication *INTERNATIONAL COMMERCE*, which features up-to-the-minute information on items of continuing general value such as investment opportunities and trade fairs. There are also available many specialized booklets, containing statistical data.

Accurate information is also available from members of the various trade missions from Mississippi and surrounding states. International House in New Orleans, a privately financed organization created to help businessmen in the New Orleans area to engage profitably in foreign trade, can be of immeasurable assistance. Mr. William R. Martin, whose offices are in the new International Trade Mart at the foot of Market Street, has served as Director of International Relations for International House, and can supply a comprehensive picture of the assistance that institution can render. Commercial banks in the area and the state universities have many items of helpful information, and law students specializing in foreign trade can do wonders in research on some problems. One of the critical needs today is for bilingual people capable of handling *Legal* Spanish to English translations. Some of the law students in the International Law Society at George Washington University are presently engaged in translating the Agrarian Code of Panama for a project contracted to private firms by the State Department. There is no English translation available today, at least within the reach of the State Department or the Library of Congress.

Other valuable sources of information are the Department of Commerce in Washington and its Bureau of International Commerce; the Department of State and its A.I.D.; the Small Business Bureau; the Department of Agriculture; the Commercial and Agricultural Attaches with American Embassies abroad; the Pan American Union in Washington; the Trade Bureau in Foreign Embassies situated in the United

States; Foreign Consulates here; the headquarters of the Central American Common Market in Tegucigalpa; the big Commercial Banks; the United States Chamber of Commerce; the American Society of International Law; the Inter-American Bar Association; specialized legal firms in the United States and abroad (lists of foreign lawyers are available from the State Department) and such publications as *A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS*,<sup>35</sup> edited by Walter S. Surrey.

The Board of Commissioners of the Port of New Orleans, the Export Managers Club of New Orleans, the Forwarding Agents and Foreign Freight Brokers Association of New Orleans, and the New Orleans Board of Trade, Ltd., are additional close-by sources of essential information. Many times Export Merchants, Export Agents and Export Commission Houses, and Export Managers, may be the best entree into international trade.

The Department of Commerce offers a catalog of investment information and activities. Its sources include A.I.D., various banks, foundations and private firms which have sponsored numerous industrial feasibility and economic studies in developing nations. Many of these reports contain valuable information on specific investment opportunities. The difficulty in the past has been in finding these reports. Now they are collected in a Department of Commerce catalog. A summary of each report has been prepared and these have been printed on individual cards. These and other cards containing information on current specific joint venture opportunities may be purchased for thirty-five cents each; the entire set is available for 250 dollars. The Department has also published an index to the catalog, identifying each investment report by country and industry. This index and the cards can be obtained by writing to the Office of Development Finance and Private Enterprise, A.I.D., Washington, D.C., 20523.

Each survey explores and analyzes the economic and technical feasibility of a proposed investment. It will usually include an analysis of the potential market, plant location suggestions, raw material availability, availability of qualified personnel and labor supply, profitability and financial considerations including capital requirements, potential contribution of the investment to the host country's economy, and a considerable amount of specialized detail.

The A.I.D. program of feasibility studies not only provides advice, it also provides the possibility of an A.I.D. refund of half of the cost of the study if the entrepreneur decides against going ahead, provided

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<sup>35</sup>A *LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS* (Surrey & Shaw ed. 1963).

he permits the study to become the property of A.I.D. for future distribution to others.<sup>36</sup>

A.I.D. also is a source of loans, both in local soft currencies and in dollars, for investment abroad. One authority allows certain of the foreign currencies received by the United States Government in payment for surplus agricultural commodities to be loaned to qualified borrowers for purposes of developing business and expanding trade.<sup>37</sup> These are called "Cooley" loans, after Congressman Harold D. Cooley, who sponsored the amendment to Public Law 480.

A.I.D. also has authority to make dollar loans to private as well as public enterprise.<sup>38</sup> But the borrower must have first failed to acquire financing from private financial sources. A list of private United States financial institutions who have been authorized to participate in loans and/or shares of ownership in foreign enterprise, is available from A.I.D. These are called Edge Act Corporations and their organization is closely defined.<sup>39</sup>

The oldest United States Government institution concerned with assistance to Latin America is the Export-Import Bank, formed in 1934 and reincorporated in 1947 under Federal Charter.<sup>40</sup> Ex-Im Bank's principal function is to promote sales of United States industrial and farm equipment through credits. An example would be the purchase of United States mill equipment by a steel-making firm in Latin America. Ex-Im Bank's loans are generally at a higher interest rate and for a shorter term than those of A.I.D. Sometimes Ex-Im Bank and A.I.D. will join in financing a project.

The International Bank for Reconstruction and Development,<sup>41</sup> better known as the World Bank, has two affiliates, the International Finance Corporation,<sup>42</sup> (I.F.C.) and the International Development Association<sup>43</sup> (I.D.A.). All three are deeply involved in Latin American

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<sup>36</sup>See Foreign Assistance Act of 1961 § 221, 75 Stat. 429, 22 U.S.C. § 2181 (1964).

<sup>37</sup>Agricultural Trade and Development Act of 1954 § 104(e) 68 Stat. 456.

<sup>38</sup>Foreign Assistance Act of 1961 § 201, 75 Stat. 426.

<sup>39</sup>Federal Reserve Act Amendments of 1919 § 25(a), 12 U.S.C. §§ 611-31 (1964).

<sup>40</sup>12 U.S.C. § 635 (1964) as amended 1961. The original organization was pursuant to Executive Order 6581 of Feb. 2, 1934. See generally Sauer, *The Export-Import Bank and Private Foreign Investment*, 19 FED. B.J. 327 (1959).

<sup>41</sup>60 Stat. 1440 (1945), 22 U.S.C. § 286 (1964). See generally International Bank for Reconstruction and Development, *Policies and Operation of the World Bank, I.F.C. & I.D.A.* (1964).

<sup>42</sup>See generally B.E. MATECKI, *ESTABLISHMENT OF THE INTERNATIONAL FINANCE CORPORATION AND UNITED STATES POLICY* (1957).

<sup>43</sup>The necessary fifteen signatures required were achieved on September 24, 1960, the United States becoming a member under Public Law 86-565, June 30,

development. They are major instruments for attracting capital from industrial countries to Latin America. Since its founding in 1944 the World Bank has made more than 2 billion dollars in loans to Latin America, mostly in the urgently needed fields of electric power and transportation. I.D.A., organized in 1960 by the World Bank to meet special financial needs of developing nations, has extended credits of almost 100 million dollars to ten Latin American countries. The I.F.C., formed in 1956 to promote industrial development through private enterprise, has committed about two-thirds of its investment to Latin America.

Another important institution is the Inter-American Development Bank, (I.D.B.), a regional institution created by the member states of the O.A.S. in 1960.<sup>44</sup> This bank extends loans to member governments from its ordinary capital resources and from the fund for special operations for projects generally in the areas of transportation, industry and agriculture. It also administers the Social Progress Trust Fund, which is financed by the United States. This fund began operation in May 1961, when the United States Congress appropriated 394 million dollars for social development and loans for projects such as land settlement and improvement, low-cost housing, water supply and sanitation facilities, and higher education.<sup>45</sup>

The Atlantic Development Group for Latin American Investment Company, (ADELA), with offices in Paris and Lima, is a private organization with capitalization of 31.15 million dollars. It was formed in July 1963 and subscribed to by fifty-four of the largest companies in Europe, Japan and North America. Total assets of member firms exceed 200 billion dollars. ADELA was first proposed in 1962 by Senator Javits and then Senator Hubert Humphrey in the Economic Committee of the NATO Parliamentarians Conference. It supports the Alliance for Progress goal of seeking to enlist the full resources of private enterprise in achieving the desired aim of economic and social development. ADELA projects will primarily be moderate ventures in manufacturing and possibly agriculture, consumer goods, food processing, textiles, fertilizers, wood processing and building materials, metallurgical and chemical industries. Investing companies can purchase shares

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1960, 74 Stat. 293, 22 U.S.C. § 284 (1964). This association, like the I.B.R.D., is an international organization whose members are governments of nation-states.

<sup>44</sup>The establishing agreement received sufficient ratifications and became effective on December 30, 1959. United States authorization to participate was the Inter-American Development Bank Act of August 7, 1959, 73 Stat. 299, 22 U.S.C. § 283 (1964).

<sup>45</sup>The Social Progress Trust Fund Agreement, executed June 19, 1961, between the Bank and the United States.

valued up to \$500,000 but not less than \$100,000, and no single investor can hold more than one percent of the total capital stock.

The Central American Bank for Economic Integration (C.A.B.E.I.) which is located at Tegucigalpa, Honduras, and which bears the Spanish initials B.C.E.I., is a specialized financial institution that promotes, through loans and technical assistance, projects in the fields of highways, electrification, housing and regional industries. Its financing capacity has just been increased as the result of being named the administrator of an integration fund of 42 million dollars, 35 million dollars of which has been provided by a forty year loan from the government of the United States. It was organized by a treaty signed in Managua on December 30, 1960, and has an authorized capital of 40 million dollars.<sup>46</sup> By May 31, 1965, it had granted ninety-five loans totaling 35.8 million Central American pesos.<sup>47</sup> The Bank has recently contracted with Arthur D. Little Company for thirty feasibility studies on development possibilities in its area of responsibility.

The newest institution is the Inter-American Saving and Loan Union organized on November 12, 1964. Its chairman is Dr. Ricardo Garcia of Santiago, Chile.<sup>48</sup> It is still in process of organization and as yet is not truly functional, but it has great potential in an area where there has been a void.

Space does not permit the presentation of the many other elements of assistance available. But attention should be directed to the A.I.D. programs of investment insurance.<sup>49</sup> Rates are greatly reduced from those originally asked, and protection is available for such risks as expropriation, war and insurrection, and inability to convert foreign currency earnings into dollars. These are generally lumped under the term Specific (Political) Risk Guaranty Program. There is, in addition, the Extended Risk Guaranty Program, more limited in scope, offering guaranty coverage to eligible investors against any and all risks except fraud or misconduct for which the investor is responsible. Coverage is normally limited to seventy-five percent but in certain housing investments one hundred percent coverage is available.

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<sup>46</sup>Agreement establishing the Central Bank for Economic Integration was signed December 13, 1960, at Managua, Nicaragua, by Guatemala, El Salvador, Honduras and Nicaragua; text in *Multilateral Economic Co-operation in Latin America*, 1 U.N. Doc. No. E/CN. 12/621, at 26 (1962).

<sup>47</sup>The Central American peso is the BCEI unit of account for all operations and is equivalent to the United States dollar.

<sup>48</sup>This organization, not yet fully functional, was described to the Committee on Housing and Urban Renewal of the Inter-American Bar Association, Washington, D.C., in March 1966, by Dr. Garcia.

<sup>49</sup>See Foreign Assistance Act of 1961 §§ 221-24, 75 Stat. 429, 22 U.S.C. § 2181 (1964).

Although it is impractical as well as impossible for every general practitioner to acquire competency in these and other related areas, progress demands a number of lawyers in the state who possess at least a speaking acquaintance with the terms, and a general idea of the assistance available to his client, plus some reliable sources of additional information and advice. There is an imperative need for attorneys in Mississippi to acquire a true competency and understanding of the world of transnational trade. Without this nucleus of informed members, the Bar cannot exert the leadership and guidance that are its responsibility, and the state will be severely handicapped in striving toward the goals which led to the formation of the A & I Board and the Marketing Council.<sup>50</sup>

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<sup>50</sup>Initial library acquisitions for any lawyer interested in the field of international business transactions should include *A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS* (Surrey and Shaw ed. 1963), published by the American Law Institute, and *WHITMAN, GOVERNMENT RISK-SHARING IN FOREIGN INVESTMENT* (1965), published by Princeton University Press.

# UNITED STATES TAX ASPECTS OF EXPORT OPERATIONS

*John H. Guttentag\**

## I. FEDERAL TAXATION OF FOREIGN OPERATIONS IN GENERAL

### A. Basic Principles Governing U.S. Taxation of Foreign Operations

The first area of consideration involves the general rule governing taxation of individuals and legal entities. The general rule governing the taxation of corporations organized in the United States, and engaged in foreign activities is that such corporations are taxable on their world-wide income.<sup>1</sup> There are, however, several advantages to using a branch of a domestic corporation in order to do business overseas, and special tax incentives apply to corporations which restrict their overseas activities to Latin America. There is one important non-tax consideration which relates to the management of the foreign operations. Managers may find that they are able to maintain more control over a branch operation than over a separate subsidiary, and there may be less disruption in the operation of a branch, but these problems could be solved and should not be controlling.

The most important advantage resulting from the use of a branch operation is that any losses generated from the overseas operations, either as a result of ordinary start-up losses or additional losses during operations, can generally be offset in full against any United States taxable income for federal income tax purposes. The major disadvantage is that all of the income of the branch would be subject to full United States tax at the present maximum corporate rate.

A U.S. corporation, if it restricts its activities to Latin America, may take advantage of a special classification which may enable it to have its income taxed at a special rate, generally fourteen percentage points less than that of a normal domestic corporation. We shall discuss this Western Hemisphere Trading Corporation in more detail later.

### B. Taxation of Foreign Subsidiaries of Domestic Corporations

While domestic corporations are often used for the purpose of conducting export operations in Latin America and elsewhere throughout the world, the most common method of manufacturing outside the United States is through the use of a foreign subsidiary of a United States corporation. The most important tax rule with respect to the use of a foreign subsidiary is that such corporations are subject to tax

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<sup>1</sup>INT. REV. CODE OF 1954, §§ 11, 7701(a)(4).

only on their United States—source income.<sup>2</sup> There is a later discussion of the rules for determining the source of income for this and for many other purposes important under the Internal Revenue Code. This self-imposed limitation on tax jurisdiction was one of the reasons for the passage of the foreign provisions of the Revenue Act of 1962. Most of these provisions are found in Subpart F of the Code.<sup>3</sup>

Another important rule is not a United States tax rule, but it is a rule prevalent in many foreign countries which desire to encourage the creation of corporations in their jurisdiction. Included among the countries that have such a rule are Switzerland, the Bahamas, Panama, Venezuela, and the Netherlands Antilles. These countries either tax most foreign-source income at a low rate or exempt it from tax completely. This means that a corporation organized in one of these jurisdictions that does not do business within the country may not be subject to income tax within that jurisdiction at all. If it avoids having United States-source income then a foreign subsidiary of a United States corporation would be subject to tax neither in the United States nor in the country of its incorporation. This only leaves open the possibility of taxation in the countries in which this corporation—often called a “base” or a “tax-haven” corporation—is actually engaged in operations. Of course, it is possible that the corporation never actually “operates” in any other foreign country. It could be used, for example, to buy goods in the United States and sell them in other countries without actually ever subjecting itself to the jurisdiction of any other foreign government. It could also be used for the purpose of licensing of patents and other proprietary rights in these foreign countries. The income earned by the foreign corporation would not be subject to tax until it was returned in the form of dividends to the parent corporation in the United States. Profits therefore remain available, entirely free of tax, for reinvestment or for initiation of new activities in other areas of the world. The foreign provisions of the 1962 Act were designed to close these and similar so-called loopholes.

The Revenue Act of 1962 will be considered in various places throughout this paper, but in summary the effect of the Act is to tax United States shareholders of such base or tax-haven corporations on certain earnings of these corporations as if they had actually been distributed as dividends. The stated purpose of the legislation is to tax the income of foreign corporations to the extent they were used for the sole purpose of deferring tax. There are various unexpected results, however, and the Revenue Act of 1962 completely disrupted tax planning, thus requiring a new orientation.

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<sup>2</sup>See INT. REV. CODE OF 1954, §§ 881-82.

<sup>3</sup>See INT. REV. CODE OF 1954, §§ 951-65.

### C. Taxation of U.S. Citizens and Residents

United States citizens and residents are subject to United States income tax on all of their income, wherever earned. U.S. citizens, however, who have earned income abroad may be exempt from United States tax on a maximum of 25,000 dollars of such income.<sup>4</sup> Subject to the problems of foreign taxation, these provisions might provide a substantial incentive to managerial personnel to relocate overseas, either temporarily or permanently.

There are two rules governing this exemption. One relates to persons who are temporarily abroad, known as the "17 out of 18 month rule,"<sup>5</sup> and the second relates to persons who are actually residing in a foreign country.<sup>6</sup> In order to qualify under the first rule the United States citizen must spend at least 510 full days during any period of 18 consecutive months in a foreign country or countries. Upon such qualification this U.S. citizen may be allowed an exemption of 20,000 dollars on foreign earned income for a full tax year pro rated for partial periods.<sup>7</sup>

In order to qualify under the residence test the U.S. citizen must prove that he is a qualified resident of a foreign country. There is no hard and fast rule for determining residence, and the Internal Revenue Service will look at all the factors involved.<sup>8</sup> Such person may exempt 20,000 dollars of earned income, but if he establishes such residence for a period of three years or more the exemption increases to 35,000 dollars per year.<sup>9</sup>

There are several important rules to remember with respect to both of these exemptions. First, the physical presence test is construed very strictly, and careful records should be kept of both the exact hour and day of departure and the hour and day of return to the United States. Second, the rule only relates to earned income from sources outside the United States. That would include compensation in the form of salaries, wages, bonuses, professional fees, and so forth.<sup>10</sup> Presence in a foreign country does not exempt United States taxpayers from filing federal income tax returns, though there is a provision permitting an automatic two-month extension of the ordinary filing date.<sup>11</sup>

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<sup>4</sup>INT. REV. CODE OF 1954, § 911(c)(1).

<sup>5</sup>INT. REV. CODE OF 1954, § 911(a)(2).

<sup>6</sup>INT. REV. CODE OF 1954, § 911(a)(1).

<sup>7</sup>INT. REV. CODE OF 1954, § 911(a)(2).

<sup>8</sup>See Treas. Reg. § 1.911-1 (1957).

<sup>9</sup>Treas. Reg. § 1.911-2(a)(4) (1966).

<sup>10</sup>Treas. Reg. § 1.911-2(c) (1963).

<sup>11</sup>Treas. Reg. § 1.6081-2 (1959), as amended, T.D. 6638, 1963-1 CUM. BULL. 297.

Employees going overseas should be acquainted not only with the foregoing U.S. tax rules, but also with the extent of their liability for foreign tax. Employees should be advised of their responsibility to pay foreign taxes, as failure to do so may jeopardize the company's position in the host country, especially if it is relying on government cooperation and assistance. Careful personnel records should be kept indicating departure and return dates, expense accounts, affect of tax treaties, and so forth.

#### D. The Foreign Tax Credit System

The foreign tax credit system is a device whereby the United States unilaterally permits foreign jurisdictions to have first crack at foreign-source income.<sup>12</sup> With certain exceptions this means that United States taxpayers who have foreign-source income and who are subject to foreign income taxes may credit those taxes directly against United States taxes which would otherwise be payable on such income.

#### E. The Interest Equalization Tax

While not an income producing measure, the interest equalization tax is important to potential investors. The title of the law is misleading as it applies to most types of stocks, bonds, and other securities. The effect of the tax is to increase the cost of equity investments by fifteen percent and to raise the price of borrowing in the United States by approximately one percentage point.<sup>13</sup> While the law must not be overlooked in any tax planning, it will not generally be applicable to overseas traders. Exemptions are provided for export-related loans and also for investments in less developed countries. The law does not apply in the case of a direct investment; that is, if a United States investor owns ten percent or more of an overseas company, it may acquire stock and loan money to such a corporation without incurring any liability under the interest equalization tax.

#### F. Importance of "Source of Income" Rules

Three situations have previously been considered which involve the source of income. These situations concerned a foreign corporation that is subject to tax on only United States-source income; the individual residing abroad who may exempt from tax a portion of his income from foreign sources; and the foreign tax credit which gives a credit against United States tax for taxes paid with respect to foreign-source income.

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<sup>12</sup>See INT. REV. CODE OF 1954, §§ 901-72.

<sup>13</sup>See INT. REV. CODE OF 1954, §§ 4911-20.

Other situations should also be considered, specifically the Western Hemisphere Trade Corporation, in which the source of income is important. The Internal Revenue Code contains several rules used for the purpose of determining the source of income.<sup>14</sup> There are a few more rules in the regulations<sup>15</sup> and other rules developed by Court decision.<sup>16</sup> Unfortunately, not all types of income are covered by the various rules, and these situations create problems for the businessman overseas. Three rules are most important to the overseas trader. The first relates to rules regarding income earned from the purchase and subsequent sale of personal property; the second relates to the manufacture and sale of personal property; and the third relates to income earned for personal services.

This first rule is probably the most important and will often govern tax planning. This rule provides that income from the purchase and sale of personal property has its source where the *sale* takes place.<sup>17</sup> The regulations promulgated by the Treasury Department say that the sale takes place where rights, title, and interest in and to the goods passes to the purchaser.<sup>18</sup> The Regulation continues, however, and says that if the place of title passage is arranged for tax avoidance purposes, then the Service will determine the place where the "substance of the sale" occurred.<sup>19</sup> There has been substantial litigation concerning this test, and recently, primarily with respect to operations in Latin America, the Service has been notably unsuccessful in persuading the courts to adopt the "substance of the sale" test.<sup>20</sup> It is now generally agreed that the title passage test will control.

The second rule provides that the income from the manufacture and sale of personal property is allocated between the site of manufacturing operations and the place of the sale.<sup>21</sup> This requires application of complicated allocation rules and is one of the reasons for dividing these operations between separate legal entities. For example, a domestic corporation might continue to operate manufacturing facilities through its present arrangement in the United States and create a separate sales entity for the purpose of buying goods from the parent corporation and reselling them overseas. In this way it could ensure that all of its sales income was foreign-source income.

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<sup>14</sup>INT. REV. CODE OF 1954, §§ 861-63.

<sup>15</sup>Treas. Reg. §§ 1.863-1 to -5 (1960).

<sup>16</sup>See cases cited in Dailey, *The Concept of the Source of Income*, 15 TAX L. REV. 415 (1960).

<sup>17</sup>INT. REV. CODE OF 1954, §§ 861(a)(6), 862(a)(6).

<sup>18</sup>Treas. Reg. § 1.861-7 (1960).

<sup>19</sup>*Ibid.*

<sup>20</sup>See, e.g., *Barber-Greene Americas, Inc.*, 35 T.C. 365 (1960).

<sup>21</sup>INT. REV. CODE OF 1954, § 863(b).

The law provides that income from performance of personal services has its source where the services are performed.<sup>22</sup> This means that employees stationed overseas may be paid by deposits to banks in the United States, and they may even receive their pay after their return to the United States, though the law with respect to exempting certain foreign source income contains certain restrictions as to when such payments must be made.

## II. TAX CONSIDERATIONS WITH RESPECT TO CREATION OF ENTERPRISE TO OPERATE OVERSEAS

The actual physical creation of an overseas sales operation poses no serious problems. Usually all that is needed are a few desks, chairs, and typewriters. The major problems arise in connection with the establishment of a manufacturing organization and the related heavy capital investment. If operations are begun overseas through a branch, there would be no problems involved since there would be no transfer of title of machinery and equipment to the branch, nor would there be a problem in connection with the acquisition of new material. The corporation's credit would be available in order to finance the acquisitions.

If a domestic corporation's subsidiary is used to initiate manufacturing operations, which would be the case if a Western Hemisphere Trade Corporation were used, the tax problems are not difficult. The parent corporation could transfer machinery and equipment tax-free to the subsidiary,<sup>23</sup> and it could also transfer other property needed in connection with the operation, such as patent rights.

If a foreign subsidiary is to be used for manufacturing operations and the parent desires to transfer some of its assets to the subsidiary for use in connection therewith, a prior ruling is required from the Internal Revenue Service if the transaction is to be accomplished tax free.<sup>24</sup> The Internal Revenue Code provides that such exchanges do not apply with respect to foreign corporations unless a ruling is received from the Internal Revenue Service, which requires satisfying the Service that the principal purpose for the exchange is not one of tax avoidance.<sup>25</sup> It is important to note that as distinguished from other ruling areas, rulings under Section 367 in order to be effective must be obtained prior to the actual exchange or reorganization.<sup>26</sup>

One area which poses many problems for the Service concerns the

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<sup>22</sup>INT. REV. CODE OF 1954, §§ 861(a)(3), 862(a)(3).

<sup>23</sup>INT. REV. CODE OF 1954, § 351.

<sup>24</sup>INT. REV. CODE OF 1954, § 367.

<sup>25</sup>*Ibid.*

<sup>26</sup>*Ibid.*

transfer of intangible assets for use overseas. The Service will generally refuse to permit the tax-free transfer of such assets to a holding company to be used to license other related or non-related companies overseas, but on the other hand it will generally permit the transfer of such intangibles in the creation of a foreign manufacturing *affiliate*. In general, if the parent decides to use a foreign corporation to manufacture overseas, there should be no difficulty in obtaining a ruling allowing transfer of machinery, equipment, and the necessary intangibles to such an entity free of U.S. tax.<sup>27</sup>

### III. OPERATING OVERSEAS

#### A. Licensing

A United States corporation might begin operations overseas by working with established companies and providing them with the required know-how, patent rights, and other information to enable these companies to manufacture United States products overseas.

The United States company might be able to realize favorable capital gains tax rates on the sale of patents and other similar property to an uncontrolled foreign entity.<sup>28</sup> This may be accomplished even though the rights under the licensing agreement are limited in area, and compensation is measured by sales of products manufactured or some means similar to royalty payments. Section 1249 of the Internal Revenue Code effectively prevents recognizing income at capital gains rates if the foreign corporation is more than fifty percent owned by the United States taxpayer.

As in other areas there are numerous legal and practical non-tax considerations which may make a licensing agreement unattractive. One problem is the practical control over the licensee and the protection afforded the licensor under local law. On the other hand, nationalistic attitudes often serve to cause locally-produced products to be more saleable, especially if the local government is a customer.

The above discussion assumes receipt of these fees by a United States corporation subject to full United States tax. While it might be possible to use a Western Hemisphere Trade Corporation for this purpose, the question arises as to whether the mere licensing and receipt of technical assistance fees and similar types of income consti-

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<sup>27</sup>See Rev. Rul. 64-56, 1964-1 CUM. BULL. 133, defining those intangibles which the Service considers to be property and therefore eligible for tax free exchange. The Treasury recently announced certain tentative guidelines concerning the circumstances under which section 367 rulings would be issued. Treas. Announcement 66-63, 1966.

<sup>28</sup>INT. REV. CODE OF 1954, § 1249.

tutes the active conduct of a trade or business which is required to qualify as a Western Hemisphere Trading corporation.

### B. Sale of Goods

The U.S. company which sells its products overseas will be subject to full United States tax on the resulting profits. One major exception involves sales in Latin America in which case the Western Hemisphere Trade Corporation may serve to reduce the effective United States tax rate by fourteen percent.<sup>29</sup> In order to qualify as a Western Hemisphere Trade Corporation the company must first be a domestic corporation, except in certain limited instances in which a Mexican or Canadian corporation might be used. All of the Western Hemisphere Trade Corporation's business must be done in North, Central, or South America or in the West Indies, or in a combination thereof. Ninety-five percent of the gross income of the Western Hemisphere Trade Corporation must be from sources outside the United States as previously defined.<sup>30</sup> Ninety percent of the gross income of the corporation must be from the active conduct of a trade or business.<sup>31</sup> There is no reference in the statutory requirements to the actual conduct of a business in Latin America or the operation of an office in any foreign country.

In order to establish a Western Hemisphere Trade Corporation, the parent United States company will probably form a domestic corporation, very likely as a subsidiary of itself and in the same jurisdiction in which it is incorporated. This corporation will have its own officers, board of directors, and other indicia of corporate structure. Since its primary concern will be with respect to the sale of products in Latin America, its operating head will probably have a sales background. For tax purposes, although admittedly there are numerous other considerations, it is preferable to have a person who is well acquainted with corporate matters, especially financial, accounting, and pricing problems. It is not required that the Western Hemisphere Trade Corporation have an office in Latin America. Sales may be made to customers in Latin America through wholesalers, brokers, distributors, of possibly large chains. The United States company might even sell to other United States corporations already distributing goods in Latin America. Some courts have held that a Western Hemisphere Trade Corporation is not required to show that it "does business" in Latin America.<sup>32</sup>

In order to ensure passage of title and risk of loss in Latin America,

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<sup>29</sup>INT. REV. CODE OF 1954, §§ 921-22.

<sup>30</sup>INT. REV. CODE OF 1954, § 921.

<sup>31</sup>*Ibid.*

<sup>32</sup>*E.g.*, Commissioner v. Hammond Organ W. Export Corp., 327 F.2d 964 (7th Cir. 1964).

all the documents evidencing a sale must be carefully drafted, and the goods should be consigned to the seller in Latin America. The Western Hemisphere Trade Corporation may have an agent, typically a broker, in Latin America who will handle these transactions for the company.

There are numerous problems and pitfalls in the operations of a Western Hemisphere Trade Corporation, but only a few of these will be discussed. The traffic department of the company must be educated to insure that the Western Hemisphere Trade Corporation has foreign-source income. A change in the method of shipment designed to save transportation charges might result in U.S.-source income and consequent disqualification as a Western Hemisphere Trade Corporation. There may be sources of income other than the sale of the goods themselves. For example, the Internal Revenue Service has held that insurance proceeds received by the Western Hemisphere Trade Corporation as a result of the loss of the goods are from United States sources. One solution to this problem is to insure the goods for their cost only, since gross income is defined as gross receipts less the cost of the goods sold. Such procedure would result in a "wash" transaction and not in the disqualification of the Western Hemisphere Trade Corporation. The Internal Revenue Service has also held recently that interest on deferred payments paid by Latin American buyers constitutes foreign-source income and also income from the active conduct of a trade or business.

One of the most difficult problems is the appropriate pricing of the goods from the parent corporation to its Western Hemisphere Trade Corporation subsidiary. The Commissioner of Internal Revenue has the power to allocate income between the related companies in any case in which he finds that such allocation is necessary to reflect income correctly or to prevent evasion of taxes.

The Western Hemisphere Trade Corporation may purchase goods outside the Western Hemisphere to incorporate in a Latin American project. Incidental purchases outside of the Western Hemisphere will not disqualify the Western Hemisphere Trade Corporation under the requirement that all of its business must be done in the Western Hemisphere. Such transactions must be watched carefully, however.

High foreign taxes may make the Western Hemisphere Trade Corporation less desirable. If foreign taxes exceed the Western Hemisphere Trade Corporation corporate tax rate, the excess foreign tax credit might still be used if consolidated returns are filed, or through the carryback and carryforward provisions of the Internal Revenue Code.

The United States company must also consider the desirability of using a foreign corporation rather than a Western Hemisphere Trade Corporation to sell goods in Latin America or to sell goods in other parts of the world where the Western Hemisphere Trade Corporation

is not available. All facets of the problem must be considered: the areas in which the company would be operating, the types of income which it has, and the extent of foreign taxes. The principle advantage of the foreign corporation is deferral of all United States tax on the earnings until they are paid out as dividends. As previously mentioned subpart F of the Internal Revenue Code, added by the Revenue Act of 1962, removed a substantial incentive to the use of such foreign corporations for the purpose of selling United States-manufactured goods overseas. At this point the use of a foreign corporation incorporated in one of the "tax haven" countries to handle sales in various parts of the world should be considered. Prior to 1963 a Panama corporation, for example, could be used to purchase goods from its United States parent and sell them anywhere in the world. The Panama corporation would pay little local tax and no United States tax until the earnings were paid out as dividends. This is one of the situations which is dealt with in subpart F, which very briefly operates as follows.

Subpart F applies to controlled foreign corporations, which are defined generally as corporations in which more than fifty percent of the voting power is in the hands of United States shareholders. United States shareholders are defined as United States persons, including partnerships, corporations, trusts, and so forth, which own ten percent or more of the stock of the foreign corporation. There are various attribution rules to prevent division of stock among related parties. As a result of this definition seven completely unrelated United States persons could own all of the stock of the foreign corporation and it would not be a controlled foreign corporation and, therefore, not subject to subpart F. One person could own forty-six percent of the stock and the other six parties could own nine percent each. Since persons owning less than ten percent of the stock are not considered to be U.S. shareholders and since the sole United States shareholder owns only forty-six percent of the stock, the corporation would not be a controlled foreign corporation.

The next definition is that of subpart F income. This includes certain types of foreign insurance income and foreign base company income. Foreign base company income includes passive income, generally personal holding company type income, and so-called "tax haven" type income which we have discussed previously. This tax haven income, or "tainted" income, includes foreign base company sales income and foreign base company services income. Foreign base sales income includes income resulting from the purchase from a related person and the sale to any person of goods if manufactured outside of the country in which the controlled foreign corporation is incorporated. Foreign base company services income includes services per-

formed for a related person outside of the country of incorporation.

Going back to our previous example, the Panama corporation, being a wholly-owned subsidiary of a United States corporation, would qualify as a controlled foreign corporation. Since it purchased goods from a related party, its parent in the United States, and sold them outside of the country in which it was incorporated, Panama, all of its income would constitute foreign base company sales income. Under subpart F this income would be taxed to the parent United States corporation in substantially the same manner as if it had been distributed as a dividend, including provisions for foreign tax credit. This explanation greatly simplifies the intricate operation of subpart F of the Code.

At the same time that subpart F was added to the Code, subpart G was enacted with the expressed intention of neutralizing the effect of subpart F as it applied to corporations principally engaged in export trade and the increase of export business.<sup>33</sup> Export trade corporations may avoid the impact of subpart F to the extent of a portion of the income earned in what would otherwise be a "tainted" transaction so long as these earnings are reinvested by the corporation in what are known as "export trade assets."<sup>34</sup>

There are numerous other exceptions and means of avoiding taxation under subpart F. The legislation was designed to tax the so-called tax-haven type of operation. Accordingly, manufacturing operations overseas are generally exempt from tax under subpart F. The definition and examples of what is meant by "manufacturing" are included in the regulations.<sup>35</sup> Furthermore, in order to encourage investment in less-developed countries of the world, corporations which principally engage in activities within such countries may avoid the impact of subpart F so long as they continue to reinvest earnings in such areas.<sup>36</sup> The minimum distribution rules permit a company to distribute a portion of its earnings and avoid subpart F so that the tax on the distributed earnings, plus the foreign taxes paid, approximate what the over-all United States tax would have been if all of the earnings had been distributed. Controlled foreign corporations which have less than thirty percent subpart F income avoid tax under subpart F on any of the income. Conversely, controlled foreign corporations with over seventy percent subpart F income are subject to tax on the entire income.<sup>37</sup>

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<sup>33</sup>INT. REV. CODE OF 1954, § 970(a).

<sup>34</sup>See INT. REV. CODE OF 1954, §§ 970-72.

<sup>35</sup>Treas. Reg. § 1.954-3(a)(4) (1963).

<sup>36</sup>INT. REV. CODE OF 1954, § 954(b).

<sup>37</sup>*Ibid.*

#### IV. TAX CONSIDERATIONS WITH RESPECT TO REMITTANCE OF FOREIGN SUBSIDIARY EARNINGS AND LIQUIDATION OF FOREIGN ENTERPRISES

Numerous tax decisions must be made even after the foreign operation is initiated. We will discuss some of these problems very briefly.

It is not uncommon to find that some foreign income may be blocked as a result of the action of a foreign government or an agency thereof. United States tax rules will often permit deferring tax of such income until it becomes available or is actually used by the taxpayer.<sup>38</sup> United States taxpayers may be required to compute the earnings of a foreign corporation, which in itself is not subject to United States tax, in accordance with United States tax standards for the purpose of determining the taxability of dividends, the extent of the foreign tax credit, and numerous other purposes. The regulations contain rules for such determinations which do not require a complete revamping of the foreign accounting system, but generally they require adjustments where there are significant differences between foreign books and records and acceptable United States accounting and tax standards.

In order to avoid United States tax, some United States corporations had foreign subsidiaries loan money to the United States parent or acquire investments and property in the United States in lieu of paying a dividend which would have been subject to United States tax. Such loans or other acquisition of United States property as defined in the Code would subject the United States shareholders of a controlled foreign corporation to tax as if the amount of the loan or other investment had been paid out as a dividend to the United States shareholders.<sup>39</sup>

It is important to time distributions from foreign corporations so as to minimize foreign taxes and maximize the United States foreign credit. For example, in several foreign countries earnings of the foreign corporations which are distributed to the stockholders may be taxed at a higher or a lower rate than earnings which are reinvested, depending upon the particular fiscal policy followed by the foreign government.

Prior to 1962 it was possible to use a foreign corporation to accumulate substantial earnings which might be free of both United States and foreign tax and then sell the stock of the foreign corporation, paying tax on the resulting gain at the favorable capital gain rates. Section 1248 of the Code, added by the Revenue Act of 1962, provides for the

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<sup>38</sup>1950-1 CUM. BULL. 50; 1950-1 CUM. BULL. 54; 1951-1 CUM. BULL. 19.

<sup>39</sup>INT. REV. CODE OF 1954, § 956.

taxation of such gain at ordinary income tax rates to the extent of earnings subsequent to 1962. This only applies to controlled foreign corporations and earnings while such corporations were controlled, and in addition exempts corporations of less developed countries if the stock has been held for a period of ten years or more.<sup>40</sup> The same method of taxation is followed if the corporation is liquidated rather than sold. Special rules permit the allowance of the foreign tax credit in many of such cases.

Mergers and other tax reorganizations of foreign corporations are made more difficult because of Section 367 of the Internal Revenue Code. This section requires that in order for such transactions to be tax free a prior ruling must be obtained from the Internal Revenue Service to the effect that tax avoidance is not one of the principal purposes of the planned transactions.

While sometimes not considered by management when initiating foreign operations, losses may result from initial start-up or unforeseen circumstances. The deductibility of these losses for United States tax purposes should be taken into account at the time that an organization is created. The same rules generally apply to worthless stocks, bonds, and debentures of foreign corporations as apply to domestic corporations. Such losses which occur with respect to a ninety-five percent owned corporation may be deducted as an ordinary loss by the parent, otherwise a capital loss would result.<sup>41</sup> The tax rules with respect to the deductibility of wholly or partially worthless obligations apply equally to obligations of foreign corporations as to domestic corporations. Special ten year carryforward, but no carryback, is permitted by the Code for losses resulting from expropriation, seizure, intervention, or similar foreign action.<sup>42</sup> A special provision permits the deductibility as a casualty loss of personal property expropriated by Cuba.<sup>43</sup> One advantage of the domestic corporation is that operating losses can be offset against other income by the filing of consolidated returns with domestic corporations, while the losses of foreign corporations are not deductible, whether arising from operations or expropriation, until the stock itself becomes worthless. Recommendations have been made to permit United States tax deductions for loss of part of the property of foreign corporations as a result of expropriation or in certain other circumstances.

#### V. TAX AVOIDANCE PROVISIONS OF THE INTERNAL REVENUE CODE

The various provisions designed to prevent avoidance of U.S. taxes

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<sup>40</sup>INT. REV. CODE OF 1954, § 1248(d).

<sup>41</sup>INT. REV. CODE OF 1954, § 165(g)(3).

<sup>42</sup>INT. REV. CODE OF 1954, § 172(b)(1)(D).

<sup>43</sup>INT. REV. CODE OF 1954, § 165(i).

in connection with foreign operations have been demonstrated principally through the use of subpart F of the Code. One difficulty faced by the Internal Revenue Service and the Treasury Department in 1962, at the time of the enactment of this legislation, was the absence of required information with respect to the extent of foreign investments by Americans and other related information. Accordingly, amendments were made in the Code to provide additional information to the Internal Revenue Service. The principal requirements are the filing of information returns with respect to foreign corporations. United States directors and stockholders of foreign corporations must provide certain information to the Internal Revenue Service upon the organization of a foreign entity or upon certain changes of stock ownership.<sup>44</sup> In addition, owners of fifty percent or more of the stock of a foreign corporation must file an annual information return.<sup>45</sup> United States shareholders of foreign corporations who may be subject to tax under subpart F of the Code are required to keep certain records with respect to the operations of the corporations so that they may be available to the Internal Revenue Service.<sup>46</sup> The authority delegated to the Commissioner of Internal Revenue to allocate income between or among related entities in order to clearly reflect income or to prevent evasion of income taxes has been discussed.<sup>47</sup> Regulations have been proposed under this section in order to provide guidelines to taxpayers as to the meaning of "arms-length" and provide safe havens where taxpayers will know that if the test of the regulations is met there will be no allocation under Section 482. Such allocation can be extremely important to taxpayers even if there does not appear to be any direct United States tax consequences. For example, if a taxpayer is trying to qualify within one of the percentage exemptions under subpart F of the Code, he might find that as a result of an allocation the percentage is not met. Similarly, a Western Hemisphere Trade Corporation could become disqualified if enough of its income were allocated to a related party.

While this practice is probably not as common as it was in the past, some taxpayers attempt to use foreign corporations for particular tax avoidance activities. The Commissioner may attempt to tax such transactions to the parent corporation on the grounds that they are sham transactions or that the foreign corporation itself had no substance. The taxpayer should ensure that there is substance to foreign

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<sup>44</sup>INT. REV. CODE OF 1954, § 6046.

<sup>45</sup>INT. REV. CODE OF 1954, § 6038.

<sup>46</sup>INT. REV. CODE OF 1954, § 964(c).

<sup>47</sup>INT. REV. CODE OF 1954, § 482.

entities and to transactions involving related foreign entities. Where practical, there should be an independent or semi-independent board of directors; regular meetings should be held; corporate records should be maintained overseas or at least one copy should be overseas.

With the increased flow of information to the Internal Revenue Service as a result of the changes made in the reporting and record-keeping requirements by the Revenue Act of 1962, and with the emphasis in the last decade by the Internal Revenue Service on overseas operations of United States taxpayers, we can expect increasing attention to tax aspects of overseas transactions. Careful knowledgeable planning will result in minimizing over-all tax burdens and increasing profits from overseas trade.

## DETERRENTS AND INCENTIVES TO FOREIGN TRADE

*Dumond Peck Hill\**

In a discussion of foreign trade, there is a considerable amount of confusion arising from problems of semantics. We use the word trade and immediately think of the export-import business. This is not the case, however, since trade and investment are more frequently than not intricately interwoven. Thus, for example, the usual pattern is for a manufacturing concern to begin sales abroad. Very soon he discovers that for a variety of reasons it may be necessary to begin assembly of his product overseas. This may be because of tax considerations in the foreign country or in the United States; it may be because of the economics of the transaction or it may be because the country, in which he is selling, will make certain advantages available to him if part of the manufacturing process is performed overseas. In some countries such as India or Mexico, the manufacturer would be precluded from engaging in the sale of his product unless some overseas manufacturing is undertaken. The manufacturer may for the same reasons decide to undertake manufacture of components or, indeed, the manufacture of the entire item overseas. It is readily apparent that in this event there must be some financial investment overseas either by the exporter himself or by others. In still other situations, trade itself becomes investment. For example, the exporter of heavy capital equipment can only in the rarest of circumstances look for payment in cash. Payment terms are usually extended over a number of years. Does the fact that the manufacturer, his backers or affiliates extend long term credit overseas make him an investor? For our purposes we will assume that trade and investment are so intricately intertwined that they will, for the most part, be treated on the same basis.

For many years preceding World War II American foreign trade was in a very serious decline. The vast majority of our overseas trade was handled through a very small number of specialized houses in our major ports. The banks, unfortunately, knew little concerning foreign trade. All except a few of our largest corporations preferred to rely on the "expert" export houses, knowledgeable in such matters, for the conduct of their overseas trade rather than relying on their own resources or knowledge.

The basic and final motivation for trade and investment overseas is the profit motive. It is true that there may be philanthropic motivations involved, but the ultimate motivation is still the expectation of making a reasonable profit. Many American concerns, unfortunately,

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engage in overseas activity in order to earn the "fast buck." There is, however, a growing number, perhaps even a majority of our traders and investors, who are looking to long range goals and who realize that to develop and protect a market they must take into consideration local requirements, local attitudes, and local needs. There are many in this country who believe that they can make a greater profit with less risk from activities in the United States or Canada than they can in the under-developed countries or indeed in the common market areas. If our trader or investor is so inclined, only knowledge of the risks and possibilities can overcome his disinclination to go overseas.

A major deterrent to foreign investment is lack of knowledge of the overseas market and the overseas investment climate. This lack of knowledge includes ignorance of local laws, local market conditions, local market potential, local labor laws, local political conditions and of the credit of the customer.

The Department of Commerce has, during recent years, performed yeoman service in order to dispel the ignorance of overseas conditions. The Department of Commerce and other government agencies make available a wealth of information as to local conditions and local problems. The potential trader or investor can find the answers to a vast number of his problems merely by asking. Indeed, he does not even need to ask. There is a veritable flood of information pouring unsolicited from our government agencies.

Another major deterrent to investment or trade overseas is the present political climate and the future political stability of the country in which the trader proposes to operate. This factor is of great significance and, in many cases, is an absolute deterrent to the timorous. Fear of lack of stability extends not only to local revolutions, but to the question of local conflagration such as the India-Pakistan dispute or the powder-keg conditions of the Near East. In some cases it encompasses fear of a major world conflagration. Another fear, which fortunately is decreasing to a considerable extent today, is the fear that earnings will not be readily convertible into United States currency or other convertible currencies.<sup>1</sup> The situation here has vastly improved because a considerable number of the world's currencies are now relatively stable.

There are a number of United States Government incentives to trade and investment abroad including the FCIA program, the operations of the Export-Import Bank of Washington, the AID Investment Guaranty Program, the AID Housing Guaranty Program, the AID All Risk Guaranty Program, the Public Law 480 Program and others. This article will

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<sup>1</sup>Thus, for example, the first major incentive to private investment overseas was the convertibility guaranty under the Investment Guaranty Program of the Economic Cooperation Act of 1948, ch. 169, § 111, 62 Stat. 145.

be limited to four specific programs: the FCIA (Foreign Credit Insurance Association), the Export-Import Banks medium term guaranty programs, the Housing Guaranty Program, and the so-called all risk guaranty program.

After World War II the European nations became more aware than the United States that they must export or die. The world's credit and financial structure was so seriously damaged that extraordinary help was necessary for the exporters of the European nations to successfully compete in world markets. Although the details and the mechanics of the new financial systems devised to meet this situation vary from country to country, they are basically similar in that they are calculated to provide a means whereby the exporter from that country can secure a governmental or other guaranty of the transaction. Such a guaranty assures the exporter that he will receive payment for all or part of the goods exported in the event of loss. Despite considerable pressure from various segments of the United States economy, our government resisted the establishment of any such system. It is true that the AID Investment Guaranty Program had been established to cover long term investments overseas, but the thinking apparently was that the exporters were doing so well that they needed no special incentives or protection. A group of United States manufacturers and banks, under the leadership and direction of Mr. Francis X. Scafuro of the Bank of America, campaigned long and vigorously in order to overcome this reluctance on the part of our government and on February 5, 1962, the FCIA was instituted under the direction of the Export-Import Bank of Washington.<sup>2</sup>

The FCIA is an association of insurance companies formed for the specific purpose of meeting the needs of the export community. Along with the Export-Import Bank of Washington, it underwrites both the political and credit risks inherent in export transactions.<sup>3</sup>

By political risks we mean those risks which arise from the actions of sovereign governments or from unusual political catastrophies. Among those risks usually considered to be "political" are (1) expropriation, nationalization and confiscation, (2) the change in convertibility rules of a foreign government so that the amounts invested or earnings received cannot be converted into U.S. dollars or into other hard con-

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<sup>2</sup>The FCIA is an association of over seventy major private insurance companies designed to offer exporters insurance covering political and commercial risks in connection with export transactions. The program is administered by the FCIA, acting as agent for the Export-Import Bank and the member companies.

<sup>3</sup>See A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 401 (Surrey & Shaw ed. 1963).

vertible currencies, (3) war, civil disturbance and riot, and (4) cancellation or restriction of an import license.

Although the above risks seem relatively easy to define, the fact is that many pages of complicated contracts have been written by AID and others endeavoring to precisely define the scope of these risks. Despite this attempt at definition, unexpected and unusual fact situations arise and raise questions as to the applicability of coverage against particular risks.

The other major group of risks which are covered by the FCIA are the so-called credit or commercial risks sometimes known in foreign circles as the *delcredere* risks. Stated simply, these are the risks of nonpayment. They also include, under some of the FCIA coverages, the risk of failure by the purchaser to accept the goods. In one case a foreign credit insurance organization, similar to FCIA, issued a policy that required the goods to be shipped before the policy applied. The insured, having notice of political difficulties and of the possibility of nonacceptance by the purchaser, did not ship the goods. As a result the insured has for years attempted to resolve the question of whether the coverage did in fact apply, or whether he should receive a return of his insurance premium.

The two major categories of policies issued by the FCIA consist of the so-called short term coverages and the medium term coverages. In either case the exporter can secure coverage of all risks or he can limit his coverage to the political risks only. The cost of the shorter coverage is, of course, considerably less.

Under the short term policy the coverage is limited to 180 days (although in some unusual circumstances it can be extended to one year) and has been broadened in most cases to include most of the loss from nonacceptance of goods by the foreign purchaser. The coverage is limited to ninety percent of the credit risks and ninety-five percent of the political risks. The exporter must agree that his entire turnover (*i.e.*, all shipments except those to Canada), must be included, or in the alternative that a full representative sampling of his exports to all countries must be covered. This assures the insurer that the insurance risks will not be limited to the higher risk destinations. There is also a limitation on the amount which can be covered to any particular country. Such limitation depends on the evaluation of our government and the FCIA of the risks involved in doing business with that country.

Under the medium term policy credits can be insured for up to five years (seven years in the case of large jet aircraft). The coverage is limited to ninety percent of the credit and political risks. The coverage includes nonacceptance of the goods. Unlike the short term policy, the medium term coverage does not require the exporter to insure on

a "whole turnover" basis. This allows the exporter to insure only those transactions where the risks involved may be substantial.

Paralleling the FCIA are a number of forms of guaranties and direct loans from the Export-Import Bank. These guaranties and loans are available in order to assist financing of overseas sales on a medium term basis. Their terms are substantially similar to the FCIA terms.

One of the major governmental incentives to foreign trade and investment is the series of amendments embodied in the foreign aid and sugar legislation concerning the sanctions imposed on foreign governments taking action against American investment or trade. Although these legislative provisions are more in the nature of sanctions, they do, in fact, operate as incentives to Americans going overseas since they remove uncertainty and give the investor or the trader added assurance as to the safety of his funds. The principal provisions involved are:

1. The Hickenlooper Amendment which provides that any nation which expropriates, confiscates or nationalizes property belonging to United States citizens and does not make prompt and adequate compensation in convertible currency within six months shall be subjected to a cut off in aid;<sup>4</sup>

2. A provision in the foreign aid legislation which provides that any government which does not meet its guaranties or pay its legitimate commercial debts shall be in like manner subjected to a cut off in aid, with the President reserving the right to waive this section;<sup>5</sup>

3. A provision in the sugar legislation, similar to the Hickenlooper Amendment, which gives the President the power to suspend the sugar quota of any nation that has nationalized, expropriated or otherwise seized the ownership or control of the property of United States citizens.<sup>6</sup>

These amendments have been roundly criticized by the executive branch on many occasions, but the fact is they have performed a useful service in giving the American investor assurance as to the safety of his funds or property and in acting to restrain foreign governments taking unjustified action against American property. The dispute on these matters becomes somewhat bitter. The opponents argue that they are an insult to foreign governments and an infringement of the sovereign power of friendly nations. The argument is also made that they are

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<sup>4</sup>76 Stat. 260 (1962), 22 U.S.C. § 2370(e) (1964), *amending* Foreign Assistance Act of 1961 § 620, 75 Stat. 444.

<sup>5</sup>76 Stat. 260 (1962), 22 U.S.C. § 2370(c) (1964), *amending* Foreign Assistance Act of 1961 § 620(c), 75 Stat. 445.

<sup>6</sup>Sugar Act Amendments of 1962 § 15(c), 76 Stat. 166, 7 U.S.C. § 1158(c) (1964).

used as a club to prevent foreign governments from taking legal and necessary actions in support of their national policies. As a consequence, so it is argued, the United States is playing the role of a tyrant and a bully.

These arguments are unpersuasive because the amendments have hardened the attitude of our executive branch in protecting American investment and American traders abroad.

The remaining incentives fall more in the area of investment than in trade, but, as pointed out earlier, trade and investment frequently intermingle and one usually follows the other.

There are a number of forward thinking persons in Congress and the business world who have advocated the maximum use of guaranties in carrying out our foreign aid program. The thought is that the government, by a limited commitment of its credit, can induce United States industry to move into the less developed areas and by the use of private funds accomplish the goals that would otherwise be accomplished by use of governmental funds. The theory behind this proposal is that the actual need for funds would be drastically reduced since the government would only spend money when a guaranty was triggered and, therefore, the ultimate burden on the taxpayer would be drastically curtailed. Unfortunately, however, our Treasury has not seen fit to go along with this proposal, and at every turn the private proposals and the legislative enactments looking toward extended use of guaranties has been throttled by the Treasury which takes the position that nothing should interfere with the national debt. Their rationale is that guaranteed loans floating around with a six percent interest rate will depreciate the value of government bonds and notes.

Guaranties were first authorized in the old Development Loan Fund which became a part of the foreign aid system in 1959, but the executive branch took the position that they could only use guaranties against a 100% reserve. Then Congress under the leadership of Congressman Frank Coffin passed an amendment making it clear that only a partial reserve need be held against outstanding guaranties. Again, the Treasury, for all practical intents and purposes, killed the proposal. Still later in the Foreign Assistance Act of 1961 provision was made for housing guaranties in Latin America<sup>7</sup> and for so-called all risk guaranties, that is, guaranties up to seventy-five percent of amount invested on any type project.<sup>8</sup>

The housing guaranty was one of the most successful undertakings in which the United States Government has invested. United States

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<sup>7</sup>Foreign Assistance Act of 1961 § 224, 75 Stat. 432, 23 U.S.C. § 2184 (1964).

<sup>8</sup>Foreign Assistance Act of 1961 § 221(b), 75 Stat. 429, 22 U.S.C. § 2181(b) (1964).

firms and others undertook large scale housing projects in Latin America. The mortgage money for these projects came from United States investors and was guaranteed by the United States Government. As a result of this program United States building techniques were utilized for the first time in many South American countries. There were several countries where mortgages as we know them in the United States were unheard of, but where today the mortgage has become a common means of home financing. There are other countries where a savings and loan system has been built up where no such system was known before. Unfortunately, the Treasury once again is in the process of strangling this program to death despite Congressional mandates that it should be expanded.

The so-called all risk guaranty program has never effectively gotten off the ground, once again because of Treasury opposition. The incentive of guaranties holds great promise but regretfully there is little being done.

This evaluation of government incentives could be summed up with the comment that although many of these incentives have operated effectively, there is still much to be done. Among the most outstanding programs are the Department of Commerce Information Program, the FCIA, and the Latin American Housing Guaranty Programs. If the government were to move ahead vigorously in this direction, the results would be immediately apparent and rewarding.

## DOING BUSINESS IN THE CENTRAL AMERICAN COMMON MARKET

*Andrew P. Power\**

The Central American Republics of Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica, with an area of 175,000 square miles and a population of approximately 12,000,000, are roughly equivalent in terms of territory and population to the combined states of Mississippi, Alabama, Georgia, and South Carolina. However, in 1960 the area's per capita income was approximately \$200 per annum, and there is no greater trade barrier than low purchasing power. As our neighbors to the south increase their industrial and agricultural productivity, they also raise their standard of living, and they may become trading partners with the producers of this area.

Because there is a greater exchange of goods among the developed countries than there is between the underdeveloped producers of raw materials and agricultural products, those who seek to expand trade can find encouragement as an underdeveloped country advances from one stage of economic growth to another. It is for this reason that the United States has supported moves for economic integration in Central and South America. It is, of course, our government's hope that these programs will be carried out in a manner consistent with the provisions of the General Agreement on Tariffs and Trade and that they will be based upon principles which are economically sound.

In March 1961, President Kennedy said: "We must support all economic integration which is a genuine step toward larger markets and greater competitive opportunity. The fragmentation of Latin American economies is a serious barrier to industrial growth. Projects such as the Central American Common Market and free trade areas in South America can help to remove these obstacles."<sup>1</sup>

A casual glance at the map of Central America would suggest that these countries should have integrated a long time ago. In fact, the area was united under Spanish rule until it obtained independence in 1821. A few years later the region was joined in a political federation that lasted from 1825 to 1838. They separated, however, and it was not until 1951 that they were successful in coming together again to form the present group.

In Resolution 9 (IV) approved on 16 June 1951, the United Nations' Economic Commission for Latin America (ECLA) invited the govern-

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<sup>1</sup>Address by President Kennedy at a White House reception for Latin American Diplomats and Members of Congress, March 13, 1961.

ments of the Isthmus of Central America to proceed with the formation of a Central American Economic Cooperation Committee, comprised of the Economic Ministers of each country, to serve as a coordinating body for the program of economic development and integration.<sup>2</sup> The Committee held its first meeting in Tegucigalpa, Honduras, in August 1952, and outlined in considerable detail a program for the development of the area.<sup>3</sup> In the following years, with the assistance of economists and technicians from the United Nations, a great deal of research and planning went forward. During this period, for example, agreement was reached on a Uniform Central American Customs Nomenclature, commonly known as NAUCA. Anyone attempting to make a study of the Central American Common Market or the Latin American Free Trade Area (LAFTA) will require a guide to the bewildering list of acronyms which sprinkle the literature.<sup>4</sup>

In 1955 the Committee established the Central American Institute for Technical and Industrial Investigation (ICAITI) and planned the first integrated industry project—a paper and cellulose plant for Honduras.

The first formal agreements to be concluded as a result of the Committee's work were the Multilateral Treaty on Free Trade and Central American Economic Integration and the Agreement on the Regime for Central American Integration Industries, both signed in Tegucigalpa on June 10, 1958.<sup>5</sup> The Multilateral Treaty provided for the establishment of a free trade area which would abolish customs duties between the countries within a period of ten years. It also provided for the elimination of disciplinary practices, insured full freedom of transit through the contracting states, and encouraged the construction of improved trans-

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<sup>2</sup>*La Integración Económica de Centroamérica*, U.N. Doc. No./CN. 12/422, at 68 (1956).

<sup>3</sup>*Id.* at 69.

<sup>4</sup>Some of the frequently used terms are the following: SIECA (Secretaría Permanente del Tratado General de Integración Económica Centroamericana or Standing Secretariat of the General Treaty for Central American Economic Integration). ICAITI (Instituto Centroamericano de Investigación y Tecnología Industrial or the Central American Institute for Research and Industrial Technology). ODECA (Organización de Estados Centroamericanos or Organization of Central American States). FECAICA (Federación de Cámaras y Asociaciones Industriales de Centroamérica or Central American Federation of Chambers and Industrial Associations). BCIE (Banco Centroamericano de Integración Económica); CABEI (Central American Bank for Economic Integration). CAUCA (Código Aduanero Uniforme Centroamericano or Central American Standard Custom Duties Code). CEPAL (Comisión Económica para la América Latina); ECLA (Economic Commission for Latin America).

<sup>5</sup>*Multilateral Economic Co-operation in Latin America*, 1 U.N. Doc. No. E/CN. 12/621, at 17 (1962).

port facilities. The Treaty also created the Central American Trade Commission to propose measures designed to attain the objectives of Central American economic integration and the establishment of a Central American Common Market.

At the same meeting the governments agreed on a program for the integration of industries.<sup>6</sup> The contracting states declared their interest in the development of industries with access to a common Central American market. It was agreed that they would regard as Central American integrated industries those industries which in the judgement of the Central American Industrial Integration Commission comprise one or more plants which require access to the Central American market in order to operate under reasonable economic and competitive conditions. This, as shall be seen, will be one of the most controversial aspects of the economic integration program.

The next major step was the Central American Agreement on the Equalization of Import Duties and Charges signed in San Jose on September 1, 1959, in which the signatories agreed to equalize import duties within not more than five years from the effective date of the Agreement.<sup>7</sup>

It appears that at this time, notwithstanding the considerable progress which had been made, there was some disagreement over the pace and scope of the program. The ECLA economists were following an intensively planned program of economic integration to produce what they believed would be a balanced and coordinated development. Certain of the governments felt, however, that less attention should be given to the integration of industries and that a customs union should be created as soon as possible. With this in mind Guatemala, Honduras, and El Salvador signed the Treaty of Economic Association on February 6, 1960.<sup>8</sup> It established immediate free trade for all products originating in their countries except for the commodities specified in an Annex.

### I. THE GENERAL TREATY

The action of the three countries in signing the Treaty of Economic Association stimulated further discussion which resulted in the basic instrument of the integration program—the General Treaty of Central American Economic Integration—signed in Managua on December 13,

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<sup>6</sup>*Id.* at 23.

<sup>7</sup>Economic Commission for Latin America, *Report of the Central American Economic Co-operation Committee*, U.N. Doc. No. E/CN. 12/533, at 25 (June 1958-Sept. 1959).

<sup>8</sup>Pincus, *The Central American Common Market*, Agency for International Development, Regional Office for Central American and Panama Affairs, 189, Sept. 1962.

1960, by Guatemala, Honduras, Nicaragua and El Salvador.<sup>9</sup> Costa Rica adhered in July 1962 and ratified its adherence in November 1963. While the General Treaty takes precedence over the earlier treaties and agreements, it does not make them invalid. The General Treaty became effective when the third ratification was deposited on June 3, 1961, and is to remain in force for twenty years.

The Treaty provides for the establishment of a Common Market and programs for industrial incentive and integration. In addition the Treaty provides for national treatment of persons and capital moving from one country to another, established a Central American Bank for Economic Integration (CABEI), and set up the administrative organs. The Central American Economic Council replaces the Economic Co-operation Committee which is composed of Ministers of Economy of the member governments. The administration of the Treaty is charged to an Executive Council consisting of a delegate from each of the countries and a permanent Secretariat. It might be well at this point to look briefly at the terms "common market", "customs union" and "free trade" as they are used in the General Treaty and in the Latin American Free Trade Association.

Articles I and II and the first paragraph of Article III of the General Treaty read as follows:

#### *Article I*

The Contracting States agree to establish among themselves a common market which shall be brought into full operation within a period of not more than five years from the date on which the present Treaty enters into force. They further agree to create a customs union in respect of their territories.

#### *Article II*

For the purposes of the previous article the Contracting Parties undertake to bring a Central American free-trade area into full operation within a period of five years and to adopt a standard Central American tariff as provided for in the Central American Agreement on the Equalization of Import Duties and Charges.

#### *Article III*

The Signatory States shall grant each other free-trade treatment in respect of all products originating in their respective territories, save only for the limitations contained in the special regimes referred to in Annex A of the present Treaty.

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<sup>9</sup>*Multilateral Economic Co-operation in Latin America*, 1 U.N. Doc. No. E/CN.12/621, at 5 (1962).

Article III of The Treaty Establishing a Free Trade Area and Instituting a Latin American Free Trade Association (the LAFTA Agreement signed at Montevideo in February 18, 1960)<sup>10</sup> provides in part that "the Contracting Parties shall gradually eliminate such duties, charges, and restrictions as may be applied to imports of goods originating in the territory of any Contracting Party." This illustrates the relatively limited goal of the LAFTA and helps define a free trade area as one in which duties are removed only as they apply to products originating in signatory countries. Each member of the area is free to maintain its own tariffs on imports from non-signatories.

The goods referred to in the quoted portion of article III of the General Treaty as being entitled to special treatment include primarily textiles, oils and fats, petroleum, and products subject to international commodity arrangements such as coffee, cotton and sugar. Today all but a few of the products in the NAUCA classification which are of Central American origin may be traded among the five countries free of import and export duties, consular fees, and other charges. It should be noted, however, that in terms of value the limited number of products subject to restrictions are estimated to constitute as much as twenty percent of the area's total trade.<sup>11</sup>

As noted above, article II provides not only for a free trade area but also for a standard Central American tariff as provided for in the Central American Agreement on the Equalization of Import Duties and Charges of September 1959. That agreement provided for the immediate adoption of the tariffs and tariff denominations listed in schedule A and an interim list of exemptions shown in schedule B which were to be progressively equalized.<sup>12</sup> The items contained in schedule B include certain foods, chemicals, and construction materials. It has been estimated that presently about eighty-five percent of the items in the NAUCA classification are subject to the common rate. As with the free trade regime, however, the exceptions amount to slightly over twenty percent of the value of total trade.<sup>13</sup> It appears, therefore, that free trade of Central American goods is almost perfected and that the five treaty countries are well on their way to the Customs Union mentioned in article I of the Treaty. A customs union generally means a free trade area plus a common external tariff on imports from non-signatory countries, all administered by a common customs agency.

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<sup>10</sup>*Id.* at 57.

<sup>11</sup>Business International, April 15, 1966, p. 113.

<sup>12</sup>*Multilateral Economic Co-operation in Latin America*, 1 U.N. Doc. No. E/CN. 12/621, at 17 (1962).

<sup>13</sup>Business International, April 15, 1966, p. 113.

Free trade within the context of the General Treaty encompasses products of Central American origin. Today the goods of a Mississippi exporter are subject to duty when shipped to Guatemala, for example. If the Guatemalan distributor should change the form of the goods or add to their value, they could be converted into goods of Central American origin and cross into El Salvador duty free. Not until the Uniform Central American Customs Code (CAUCA) becomes operative will all goods regardless of origin be freely traded within the area.

Has the Common Market, referred to in article I, been brought into full operation within the five year period? It depends on how the term "common market" is defined. Generally it is defined as meaning more than a free trade area or even a customs union, and it should also include the free movement of labor and capital and provide for harmonization of laws in such fields as labor, agriculture and banking. Within this context a common market has not yet been achieved in Central America although work is going forward in a series of harmonization measures.

In this connection one of the most interesting developments relates to the establishment of a Central American Clearing House designed to coordinate the credit policy of the member countries and adopt a uniform accounting system. By May 1964 the Secretariat of the Economic Council (SIECA) was able to advise that ninety percent of the trade within the preceding 18 months was carried out through use of the "Central American check."<sup>14</sup> Within the next few years the Central American Peso, with a value equivalent to the United States dollar, may be the common monetary unit for the area. It is presently being used by the Central American Clearing House and the Central American Bank for Economic Integration.

In addition to the continuing preparation of uniform laws in major fields of general interest, there are developments of special interest to businessmen and lawyers which are receiving relatively little publicity. One such development is the proposal of the Draft Agreement for the Protection of Trade Marks, Commercial Names and Slogans, which was recently reviewed by the SIECA and submitted to the governments for negotiation.<sup>15</sup>

## II. INTEGRATED INDUSTRIES

Since the Common Market program started in 1951, the Economic Commission for Latin America has placed a high priority on the es-

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<sup>14</sup>Carta Informativa de la Secretaria Permanente de Integracion Economica Centroamericana, Guatemala No. 31, May 12, 1964, p. 8.

<sup>15</sup>Carta Informativa de la Secretaria Permanente de Integracion Economica Centroamericana, Guatemala No. 54, April 12, 1966, p. 13.

establishment of integrated industries. It is the view of these economic planners that only with a program of complementation and industrial specialization will the area be able to fully develop the manufacturing sector. Their contention is that such a program would prevent expensive duplication of investments in small plants, permit the vertical and horizontal integration of many industries, promote lower production costs, and contribute to industrial modernization programs.

In 1958 the Agreement on the Regime for Central American Integration Industries was signed but not ratified. Although it is incorporated in the General Treaty, the governments of the Central American countries, reflecting their serious reservations about the pace and scope of the integration program, have been slow to implement it. These governments and many outside observers feel that the integrated industries program would severely limit the free operation of market forces essential to growth.

One of the objections to the integrated industries program arose from a fear that a more economically advanced country would attract most of the integrated industries. To prevent this the parties agreed that no country shall have two integrated industries before each of the other countries has at least one. The agreement also provides that the establishment of each new integrated industry shall be carried out through an additional protocol of the agreement describing in considerable detail the nature and scope of the industry and establishing standards for its products.

While the integrated industries program has not made much progress to date, it is built into the structure of the overall economic integration plan, and it may offer opportunities for qualified investments from this region.

What is an integrated industry and what would a Mississippi firm have to do to qualify? The second paragraph of article 2 of the Agreement provides as follows:<sup>16</sup>

The contracting states shall regard as Central American integration industries those industries which, in the judgment of the Central American Industrial Integration Commission, comprise one or more plants which require access to the Central American market in order to operate under reasonably economic and competitive conditions even at minimum capacity.

A summary of last year's report of the Economic Council in respect to an application for a second plant to manufacture tires and tubes might serve to illustrate the type of review an integrated industry

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<sup>16</sup>*Multilateral Economic Co-operation in Latin America*, 1 U.N. Doc. No. E/CN.12/621, at 23 (1962).

must pass. The project which had been presented by the Government of Costa Rica in December 1962 was approved by the Economic Council under the following conditions:<sup>17</sup>

1. It shall have an initial capacity of 100,000 tires and 70,000 tubes annually.
2. The capital shall consist of nominative shares of which at least 70% must be owned by Central American shareholders of whom 22% shall be from Costa Rica and 48% from the other countries in a ratio of 12% for each country. In order to guarantee that the 70% capital shall be authentically Central American, the sale of shares is to be made by banks or development institutions in the five Central American countries through announcements in the public press over a period of 180 days.
3. The direction and administration of the plant must be Central American with the Central American shareholders having a majority representation on the board.
4. The industry shall give preference to the consumption of Central American rubber at fair prices.

After approval by the Council the proposal is submitted to the various governments to be deposited as a protocol to the integration agreement. Once an integrated industry has been approved and moves into operation, its activities are closely regulated by the Economic Council.

In the case of the tires and tubes, for example, the Council specified credit terms and established a very complete price list for tires and tubes of all types.

In the early 1950's it was proposed that the glass industry would be suitable for integration. Last year, however, when the Government of Honduras requested that a firm in its area be designated an integrated industry, the Council rejected the application on the ground that there already existed projects in Guatemala and El Salvador which would have, in a short time, sufficient capacity to satisfy the consumption of Central America.

### III. FISCAL INCENTIVES TO INDUSTRIAL DEVELOPMENT

The products manufactured by integrated industries will enjoy the benefits of free trade between the territories of the contracting states and are to be granted fiscal incentives to be determined at the

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<sup>17</sup>Carta Informativa de la Secretaria Permanente de Integracion Economica Centroamericana, Guatemala No. 40, Feb. 12, 1965, p. 13.

time the industry is established. If a prospective investor is unqualified or unwilling to apply for integrated industry status, he may be interested in the incentives accorded by an individual country's laws for the promotion of industrial development. In many respects the benefits to be obtained under the individual laws equal those granted to integration industries. Or, if he can wait a few more months, he may have available the benefits of a uniform incentive law which will be similar in form to the existing laws and will be coordinated with them.

The Central American Agreement of Fiscal Incentives was signed in San Jose on July 31, 1962.<sup>18</sup> It is expected to become effective this year. The delay has been caused by factors mentioned earlier; when the incentives are made uniform in all countries, investors are likely to go to the more economically advanced countries. Some exceptions have been proposed to permit Honduras and Nicaragua to grant added incentives.

How does a firm qualify for the benefits of the law? First a prospective investor must pass a general qualification test by establishing that he will be an efficient producer of either capital goods or consumer goods of basic necessity to the economy, that his production will serve as a substitute for imported articles, or that the establishment of his industry will increase the value of exports and assist the balance of payments.

The authorities in appraising an application also consider the degree of value added in proportion to the total cost of the article and the extent to which the plant will contribute to a greater utilization of local raw materials or semi-finished goods and employ local resources in terms of capital, raw materials, and employment.

If the investment can meet the above conditions, it is then classified under one of three groups: Group A, Group B or Group C in descending order of importance to the economy. To rate Group A the new investor must either produce raw materials or capital goods, or produce consumer goods which contain raw materials or semi-finished goods to the extent of fifty percent of their value. Group B includes those who manufacture consumer goods, packaging materials, or semi-finished products as well as those producers who make a favorable contribution to the balance of payments. Group C comprises processing and packaging operations and those manufacturing industries which do not meet the requirements of Groups A and B. In addition, the Agreement in its Annex provides that a Group C classification may be extended to a list of industries including those related to the production of wines,

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<sup>18</sup>SIECA, *Convenio Centroamericano de Incentivos Fiscales al Desarrollo Industrial*, Guatemala, 1963.

beer, tobacco, perfumes, and cosmetics. As a further classification, industries in Groups A and B are designated as either new or existing.

The benefits vary, of course, with the classification. To illustrate, those firms qualifying as a new industry with a Group A rating are entitled to the following benefits:

1. A total exemption, for a period of ten years, from customs duties and other charges including consular fees on the importation of machinery and equipment.

2. Exemption from customs duties on raw and packaging materials of one-hundred percent for the first five years, seventy percent for the next three years, and forty per cent for the following two years.

3. A total exemption for a period of five years on all customs duties and other charges including consular fees on the importation of fuel, except gasoline.

4. A total exemption for a period of eight years on income and profit taxes and,

5. A total exemption for a period of ten years on all gross assets or patrimony taxes.

The following paragraphs of the law provide lesser benefits for other categories, and to Group C investors it extends a total exemption for duties on importation of machinery and equipment for a period of three years.

If after reviewing the above requirements and those of the regulations which were enacted in January 1965, the prospective investor still believes he can qualify, he should first file an application with the administrator in the Central American country in which he proposes to establish the plant. The application must contain, not only a full description of the investment, but also a technical and economic study of the market for the industry and must spell out the contribution which would be made by the new investment.

A summary of the application must then be published in both the Official Gazette and in a daily newspaper of major circulation so that any individual person or firm may oppose the classification and the authorization of the benefits applied for.

The agreement has not yet gone into effect, and many firms are presently operating under national incentive laws. When the uniform law does become effective, we can expect problems of coordination. The agreement provides that firms presently doing business under individual industrial laws may request reclassification under the new agreement. If, however, a firm should be classified under an existing law and does not request classification under the new agreement, and if this industry

would be entitled to only a Group C classification, it may be considered a subsidized industry and the case would be submitted to the Executive Council for action in accordance with article II of the General Treaty.

The regulations of the agreement should be studied very carefully. They define a manufacturing industry as one which involves the mechanical, physical, or chemical transformation of raw materials, semi-finished goods, or finished articles.

#### IV. GENERAL CONCLUSIONS

Suppose an American businessman, an independent fellow, sees a potential market in the area, but does not wish to qualify under either the integrated industries or industrial incentive regimes. He may, of course, go ahead on his own, and, in fact, this is the manner in which most firms are doing business in Central America. Once inside with a manufacturing industry, either wholly owned or in partnership with a Central American firm, he may, as noted above, move goods freely from country to country. The fact that he has not obtained exemptions from local income taxes may not be too significant because the United States will provide a tax credit for income taxes paid locally and will not spare him United States tax on the income exempted from tax in the local country. In fact some of the individual country incentive laws provide that an income tax exemption will be granted to foreign investors only on condition that the income exempted from tax will not be taxed in the investor's own country.

Although a prospective investor sees a potential for his goods in Central America, he may be concerned over political uncertainty and the possibility of expropriation. In this connection it might be well to note evidence of increasing political stability in the area. The presidential election in Guatemala, the inauguration of Lic. Jose Joaquin Trejos as president of Costa Rica, the recent election of General Osvaldo Lopez Arellano to a six year term as president of Honduras, the 1962 election of Julio Adalberto Rivera as president of El Salvador, and Nicaragua's president Dr. Rene Schick indicate that, while it may be unrealistic to anticipate continuing political stability in any part of the world, the Central American countries are making considerable progress toward that goal.

To the investor who would seek additional assurances, it should be noted that our government's Agency for International Development provides investment guaranties covering convertability and expropriation in all five countries of the Central American community.

In addition to the facilities of the Agency for International Development, our Department of Commerce offers a wide range of services to prospective exporters and investors in the Central American area.

## AN ANALYSIS OF THE OEO LEGAL SERVICES PROGRAM

*Earl Johnson, Jr.\**

The Legal Services Program of the Office of Economic Opportunity [OEO] has now been in operation for almost a year and a half. During that period, it has funded more than 170 programs, from the academic-legal aid program at the University of Mississippi to a neighborhood program on the streets of New York City; from a circuit-riding program on the Sioux Indian Reservation in South Dakota to a pure research program at Columbia University; from the Ohio States Bar's program to a program in New Haven directed by law students. OEO has now funded programs in forty-four states, the District of Columbia, and Puerto Rico; it has funded programs in the nation's thirty largest cities, and in 14 of the nation's next twenty largest cities. These grants will provide over 1200 full-time lawyers to serve the poor. OEO has spent over \$29 million on legal services programs. These are imposing figures. They are imposing because they demonstrate a vast demand for a federal program that did not even exist two years ago.

The sudden development of this new program may be explained in one of two ways. Either the program is a long overdue response to a real need, or it is a vast boondoggle—a gravy train recklessly spilling out federal funds as fast as the Treasury can bring them in.

Is there a real need for a program of this magnitude? Laymen often ask this question, but the legal profession has known for decades that the poor have substantial legal problems that are not being dealt with. In 1958, the Legal Aid Commission of the Bar Association of the District of Columbia estimated that eighteen out of every 100 people in that jurisdiction needed legal assistance.<sup>1</sup> Other authorities have indicated a national average of at least ten per thousand,<sup>2</sup> or over 2,000,000 cases per year, nationwide. The Office of Economic Opportunity estimates that the national total may be as high as 35,000,000—the total number of people in families with incomes under \$3,000 per year. Legal Aid Societies have handled an estimated 10 million matters since the second world war when the Legal Aid movement began its most significant period of expansion.

Although these abstract statistics may be interesting to laymen, lawyers do not need them to see the need for a program of legal services.

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\*Director, Legal Services Program, OEO.

<sup>1</sup>D.C. BAR ASS'N REPORT OF THE COMM'N ON LEGAL AID, 138-40 (1958).

<sup>2</sup>AM. BAR FOUNDATION FINAL REPORT ON ELIGIBILITY FOR FREE LEGAL SERVICES 9 (Aug. 1966).

Every lawyer in the country is familiar with small claims courts that serve as collection agencies for retail merchants and finance companies. Every lawyer sees domestic relations courts in which a stream of women on public assistance swear out contempt citations—almost invariably to no avail—against the husbands or boyfriends who left them penniless and pregnant. Every lawyer has encountered landlord and tenant courts inundated by petitions for evictions of impoverished tenants from marginal housing. In each of these courts, lawyers see the day pass in a tedious litany of names, each followed by the single word “judgment” droned out by the landlord’s or merchant’s attorneys. Lawyers know that the poor are not represented.

America’s practicing attorneys are perhaps more aware of this plight of the poor than anyone else in the country. It is for that reason that the bar, as a profession, has taken the lead in dealing with the problem of legal services for the poor, and has offered a variety of free and voluntary legal aids to poor people, including the many legal aid societies now functioning in our larger cities.

Orison S. Marden, President of the American Bar Association, has referred to these voluntary legal aid programs as “lawyers’ Red Cross.”<sup>3</sup> Like doctors who donate their time to public hospitals and clinics, lawyers supervise the operations and provide the services in legal aid organizations. Like doctors, lawyers rely on the support of the general community for fund raising, moral support, and referrals.

As Mr. Marden has noted, however, legal aid is even more important than public health clinics, for the courts and their functions are at the center of the meaning of our society. Reginald Heber Smith, the legal aid pioneer, put his finger on the true significance of legal aid when he said: “Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with; but injustice makes us want to pull things down.”<sup>4</sup>

The same observation was made at the turn of the century by the distinguished editor, Lyman Abbott:

If ever a time shall come when in this city only the rich man can enjoy law as a doubtful luxury, when the poor who need it most cannot have it, when only a golden key will unlock the door to the courtroom, the seeds of revolution will be sown, the firebrand of revolution will be lighted and put into the

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<sup>3</sup>Address by Orison S. Marden, Justice and the Poor Symposium at Notre Dame Law School, Apr. 16, 1966, in 41 NOTRE DAME LAW. 843 (1966).

<sup>4</sup>R. Smith, *Introduction* to BROWNELL, *LEGAL AID IN THE UNITED STATES* at xiii (1951).

hands of men, and they will almost be justified in the revolution which will follow.<sup>5</sup>

Legal aid, moreover, is vastly more important in the heart of our society than is public health because injustice creates a hatred of "the system" which threatens every member of the society. As Chief Justice Charles Evans Hughes said: "There is no more serious menace than the discontent which is fostered by a belief that one cannot enforce his legal rights because of poverty."<sup>6</sup>

Lawyers must lead and guide the "lawyers' Red Cross," because lawyers are in the best position to deal with social discontent. It is lawyers who have drafted the legislation which created America's complex and vital corporation laws. It is lawyers who have developed theories to make it possible for our business to evolve in tune to the facts of today rather than the feelings of the 1890s. It is lawyers who have devoted themselves to bringing the potential violence of the social upheavals of the 1930s and the 1960s out of the street and into the courtroom. One has only to remember Shakespeare's famous command in *King Henry V*, "The first thing we do, we kill all lawyers," to realize how fortunate we are to live in a society in which the lawyers are the proponents rather than the victims of change.

The leaders of the American Bar Association have long understood the importance of accepting and encouraging gradual changes in our legal system. Deeply conservative in the best sense of that often abused word, the ABA is dedicated to the conservation of the values and structure of our system—a system which has survived, fully intact, almost 1000 years of social change. Lewis F. Powell, Jr., a Virginia lawyer and past president of the ABA, described the ABA's position recently with great eloquence:

Looking at contemporary America realistically, we must admit that despite all of our efforts—and these have not been insignificant—far too many persons are not able to obtain equal justice under law. This usually results because their poverty or their ignorance has prevented them from obtaining legal counsel.

Our system of justice is based in large part on advocacy—on battle, if you will, in which lawyers have replaced warriors. When there is no one to do battle for an individual, his chances of obtaining justice are lessened. And if many of our fellow citizens are denied justice because of their poverty, it may be asked how long the adversary system will survive. . . .

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<sup>5</sup>*Id.* (citing address by Abbott to Legal Aid Soc'y in N.Y., 1901).

<sup>6</sup>Address by Chief Justice Hughes, American Bar Association Convention, in 45 A.B.A. REP. 227, 235 (1920).

The nature of the broad challenge that confronts us is therefore clear. There is a gap between the need for counsel and the actual availability of counsel. Until this is bridged, there is a partial failure of our system. . . .

Thus, our purpose must be to preserve our system and to strengthen it by assuring equal justice for all. This can only be attained when the advocacy of competent counsel is available to all, especially to the ignorant and the impoverished.<sup>7</sup>

The purpose of the Legal Services Program is the same as that of President Powell's—to preserve our legal system by assuring equal justice for all.

What exactly does the Legal Services Program do? What are its policies? First and foremost, it is important to state what the program does *not* do: It does not operate a program of free legal assistance in any state, city, county or town in America. It provides money, and nothing more. It provides money to local groups, universities, social welfare organizations, bar associations, or legal aid societies. If these local groups do not ask for the money, none is given. The Legal Services Program now in operation at the University of Mississippi, for example, was drafted and designed by professors and lawyers at the University. Neither will OEO put additional funds into legal services in Mississippi unless Mississippians themselves request the programs. If Mississippians do not draft programs, no one else will. In short, contrary to the misconception persistently held by some lawyers, OEO is not "establishing" programs against anyone's will, because OEO is not establishing programs.

What OEO *does* do is to give money to local groups for the operation of local programs. It gives this money when the applicants have complied with the requirements of federal law. It does nothing else, except that it reserves the right to refuse to spend federal funds on projects when its officials, in the exercise of sound administrative discretion, feel persuaded that the applicant would not provide effective service, or would provide services at too great a cost to the government.

OEO's decision making is guided by several general principles, all of which are derived from the Economic Opportunity Act of 1964, as amended. Lawyers should be involved from the beginning, consulting on drafts of the program, participating in negotiations with the government, and ultimately serving as members of the Board of Directors of the operating program. Lawyers will also be critically involved in the actual program once it is in operation.

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<sup>7</sup>Powell, *The Response of the Bar*, 51 A.B.A.J. 751 (1965).

The role of bar associations *per se* in legal program development has varied throughout the country. OEO has no set policy on what that role should be, other than that the local bar as an organization must be informed that an application to OEO is contemplated. (Where local bars have been fully informed and consulted, they have generally cooperated and supported the program enthusiastically.) Often the bar association itself will be the applicant, as in Philadelphia, Pennsylvania, where an excellent program is now underway.

A separate question is raised about the proper role of the state bar associations, as opposed to local bar associations. While state bar associations, as in Ohio and Montana, have occasionally been the applicants for OEO funds, the involvement of the state bar, like most other aspects of local programs, has customarily been dictated by local conditions rather than OEO policy. The state association in a sparsely populated state may have considerable interest in a local program, whereas the bar in a large state like New York or Massachusetts is less likely to be interested in a program in a specific city.

A further problem has arisen occasionally. Officers of local bar associations have, from time to time, objected when distant state bar officials attempted to dictate terms of local programs, and state officials have objected to the assumption of control over local matters by local attorneys. OEO's only policy on this question is to urge local and state bar associations to resolve their differences.

A second principle that guides OEO is to assure the involvement of the poor in legal services programs. OEO believes strongly that the poor should not only be served, but they themselves must serve. They can serve, not only as members of a program's board of directors, but also as trained program sub-professionals; such as clerks, receptionists, investigators, and community education aides. OEO requires the involvement of the poor because of a specific congressional demand. Title II of the Economic Opportunity Act requires that there be "maximum feasible participation of residents of the areas and groups to be served."

The participation of the poor in program policy-making as members of the board of directors and of adjunct advisory groups is equally important. To date, every operating legal services program funded by OEO has representatives of the poor on the board, and the national average is about one-third of the membership of each board. This kind of participation has been made an official policy objective of the National Legal Aid and Defender Association in its efforts to increase the number of Legal Aid Societies across the country.

The fact that laymen sit on the board of a legal services project does not violate the Canons of Ethics, as has been suggested. At last

count, some eighty-five per cent of all Legal Aid Societies operating throughout the country before 1964 had laymen on the board, and there has been lay participation of this kind since the first legal aid program was established before the turn of the century. Moreover, representation of the poor on policy-making bodies promises to provide legal aid programs with a fresh perspective on the needs of the low-income community, and with a fresh dialogue between diverse community residents who may never before have communicated with one another. This dialogue may be the key to the fruitful resolution of numerous problems confronting the poor. It should aid inestimably in the process of educating the target community to know its rights and seek their protection.

Assuring community education is a third essential requirement of OEO Legal Services Programs. Because of poor education, illiteracy, fear, and simply an apathy born of despair, the poor know relatively little about their rights as individual citizens or the processes by which those rights are protected. To many, especially the members of minority groups, the law has traditionally been an instrument of the "enemy"—the planter, the merchant, the welfare official, and the policeman. It has not been viewed as a tool which can protect men as well as destroy their rights. Community education can change this distorted conception. Education programs, especially those conducted through the schools, can create a new sophistication in low-income community residents, and enable them to know and treasure their rights, just as other Americans know and treasure the guarantees our legal system offers. Because it promises to change the future as well as the present status of the poor, community education is one of the most vital aspects of the legal services program.

A fourth requirement of the OEO program is that attorneys employed by legal services programs conform in their practices to the profession's canons of ethics. If OEO's programs are to be viable, if they are to provide a level of professional service equal to the needs of the poor, their standards of conduct and the standards of their individual attorneys must remain of the highest order.

Some critics of the OEO program have asserted that the canons of ethics must necessarily be subverted by legal services programs. Specifically, reference has been made to Canons 27, 28 and 35. Canon 27 forbids solicitation. An exception to the Canon's general rule has been recognized, however, where free legal services are provided to indigents whose constitutional rights have allegedly been violated.<sup>8</sup>

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<sup>8</sup>AMERICAN BAR ASS'N, *OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES*, Opinion 148, Nov. 16, 1935, at 308 (Rev. ed. 1957).

Similarly, bar associations which have established legal aid clinics and lawyer referral services have been permitted to publish material designed to make the public aware of the legal services, provided the material is in good taste.<sup>9</sup> In such cases, of course, the names of individual attorneys may not be used.

Canon 28 forbids "seeking out those [with] claims for personal injuries or . . . any other grounds of action. . . ." It cannot be denied that the community education projects in legal services programs will seek out those with valid causes of action. The Supreme Court has held, however, that the import of Canon 28 is that it is designed to prevent "the use of legal machinery to oppress: as, for example, to sow discord in a family; to expose infirmities in land titles, as by hunting up claims of adverse possession; to harrass large companies through a multiplicity of small claims; or to oppress debtors as by seeking out unsatisfied judgments."<sup>10</sup> And beyond this, for a lawyer to attempt to reap gain by urging another to engage in private litigation has also been condemned. Obviously, legal services programs are not in conflict with these requirements.<sup>11</sup>

Canon 35 forbids lawyers to work for individuals who are members of an "association, club or trade organization" in which the

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<sup>9</sup>*Id.* Opinion 205, Nov. 23, 1940, at 416; opinion 179, May 8, 1938, at 355.

<sup>10</sup>*N.A.A.C.P. v. Button*, 371 U.S. 415, 441 (1963) (footnotes omitted). See *Brotherhood of Ry. Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964).

<sup>11</sup>See *Gunnels v. Atlanta Bar Ass'n*, 191 Ga. 366, 12 S.E.2d 602 (1940). An action was brought by a finance company to enjoin the Atlanta Bar Association and its members from conducting a campaign against usurious money lenders. In holding for the Bar Association, the court said:

Nor was the defendant's [Bar Association] offer to represent free of charge persons caught in the toils of the usurious money-lender in defending against such illegal exactions, and to represent them in bringing actions to recover amounts illegally paid under loan contracts, a violation of [Georgia statutes] in relation to solicitation of legal employment and the offense of barratry. We do not believe that it is true . . . that the enforcement of the usury laws of this state is a matter solely for the law enforcement officers and of those from whom usury is being exacted and that it is illegal and unethical for lawyers to publicly criticize an alleged widespread violation of such laws and to seek to eradicate the evil by the means here shown. Much could be said as to why their position in the community makes it entirely appropriate that they undertake such a movement and assume such responsibilities in reference to the general welfare of the public.

*Id.* at 382, 12 S.E.2d at 610-11.

One sentence from the opinion which seems to sum up the court's view of the activities of the bar association is "for all of this they should be commended rather than condemned." *Id.* at 381, 12 S.E.2d at 610.

lawyer may be employed. This canon, however, specifically excludes "charitable societies rendering aid to the indigent." Legal aid societies, moreover, have never been considered by the bar as within the class of prohibited lay intermediaries.<sup>12</sup>

It has been specifically held in at least one case that Canons 27, 28 and 35 are not applicable to legal services programs.<sup>13</sup> It is also relevant to point out that there is essentially no difference except source of funds between legal services programs and legal aid societies, which have been operating throughout the country for the past seventy-five years. Finally, it is important to note that local bar associations, acting in a creative supervisory capacity, can provide the most effective insurance against violations of the canons of ethics.

A fifth basic requirement is that the attorneys employed in OEO programs must remain as completely independent in their dealings with their clients as they would be were they working in a private law firm. More specifically, no member of the Board of Directors, the board as a body, or any other policy or advisory group within a program can have any power over the direction of an individual client's case once that case has been properly accepted by the attorney.

Requirements six and seven are interrelated, insofar as they touch upon the questions of who is to be served by OEO-funded legal services programs, and whether these programs are likely to be in economic competition with the private legal community in the area of project operation. It is a fundamental premise of the Office of Economic Opportunity that no legal services program shall compete with private lawyers. Specifically, OEO-funded projects are not to provide gratuitous service to persons whose financial means in the local economic context indicate they can pay for a lawyer, or to persons with so-called "fee-generating" cases (*e.g.*, negligence actions) where the services of a private attorney may be attracted under a contingent fee arrangement. This is an absolutely unalterable OEO policy, for OEO believes that there is no faster way to destroy this program—and thus do the greatest possible disservice to the poor—than to challenge the legal profession to economic warfare.

It is accordingly gratifying to note that not only are OEO-funded projects not taking business away from private lawyers, but that lawyer referral reports from numerous locales strongly suggest that OEO-funded projects are increasing business for private practitioners. The

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<sup>12</sup>See, *e.g.*, *Azzarello v. Legal Aid Soc'y*, 117 Ohio App. 471, 185 N.E.2d 566 (1962).

<sup>13</sup>*In re Community Legal Servs., Inc.*, No. 4968, Philadelphia, Pa. Ct. C.P. No. 4, June 30, 1966.

Legal Services Program in Philadelphia, Pennsylvania, for example, consistently refers approximately five per cent of all applicants to private counsel. The program in Washington, D. C. refers approximately three per cent of its applicants. In Alameda County, California, the bar association reports that referrals from its referral service have quadrupled since 1963; in New Haven, the birthplace of the neighborhood office, referrals have tripled; and the Southwest Los Angeles Bar Association reports that it has had to open a second referral office because of the tremendous volume of business stimulated by the operations of four legal services programs in the county. The advent of legal services projects in low income communities has started people thinking about lawyers for the first time.

OEO has no national standard of eligibility for legal services, just as it has no standard or model of how legal services should be offered to a given low-income community. The local community itself must determine, in the light of all relevant circumstances, a just measure of eligibility, taking into consideration weekly or monthly income in the area, debts, etc. The basic test is simple: at approximately what income level can a person obtain legal services in the private legal community without cutting into his resources for food, shelter, clothing, and other necessities. Within this broad definition, the range of possible tests is striking. In Edinburg, Texas, a single person with no dependents is eligible if his income is below \$74 a month, but the same person in Bay Shore, Long Island, may make up to \$325 per month. In Memphis, a married couple with no children may only earn \$87 a month, but they would still be eligible in Wheaton, Illinois if they earned \$350 a month. The decision is the community's, and OEO will respect any reasonable decision made by a locality.

Finally, there remains the question of the organizational form which OEO-funded legal services programs may take. This too, is a matter for local resolution. In the populous metropolitan areas of the nation, communities have frequently proposed the use of decentralized neighborhood law offices in, or near, community action neighborhood centers offering other services and assistance to area residents. In rural areas, attorneys move through a multi-county area on a regular schedule, visiting a new area each day, and returning to the same place a week or so later. Migrant programs in California and Florida contemplate various other ways of covering huge areas of land. The common denominator of all these programs is that the service in each is to be offered by full-time salaried attorneys. In every other way, however, the programs vary widely in form and content, depending on the needs of local communities. It bears repeating that form and content are not designed by the federal government, but by the particular locality.

An exception to the full-time salaried lawyers system is provided by the few experimental "Judicare" or English-system plans which OEO has funded in northern Wisconsin, sections of Montana, in Durham, North Carolina, and in a small township near San Francisco, California. These are programs whereby some branch of the state or local government or other organization certifies the indigency of a potential client who may then consult the private attorney of his choice. The attorney's fee is paid, either partially or entirely, by OEO. Many lawyers have expressed interest in these programs and have sought similar programs for their own areas. OEO, however, has stressed that Judicare programs funded to date are only experimental and are not to be taken as an indication that the government is prepared to endorse such programs on a wholesale basis. For the time being at least, OEO has adopted a wait-and-see attitude on Judicare and will carefully examine the results of existing programs before proceeding to expand their number. This cautious approach reflects OEO's belief that Judicare, except in unusual settings, will not prove the most efficient and economic method of providing legal assistance to the poor in the context of the War on Poverty. OEO's reservations about Judicare were most lucidly expressed by the former director of the Legal Services Program, E. Clinton Bamberger, Jr., in an address to the National Conference of Bar Presidents in February 1965.

Mr. Bamberger stated:

But these apparent advantages are, unfortunately, more advantageous for lawyers than for the poor we are committed to assist. Indeed, for the poor, such a plan has at least one major deterrent. The contemplated certification of indigency would require them to submit themselves to another means test by the welfare authorities or their counterparts. It is a certainty that vast numbers of poor people would be too frightened or too proud to place themselves voluntarily in the gears of another bureaucracy, with the result that they simply would not participate in the program at all.

The "English System" is also disadvantageous for another reason that I consider even more important. It clearly can achieve no other goal than the mere resolution of controversies. The Legal Services Program of the Office of Economic Opportunity and the Legal Aid movement have far greater ambitions.

We cannot be content with the creation of systems of rendering free legal assistance to all the people who need but cannot afford a lawyer's advice. This program must contribute to the success of the War on Poverty. Our responsibility is to marshal the forces of law and the strength of lawyers to combat the causes and effect of poverty. Lawyers must uncover the legal

causes of poverty, remodel the systems which generate the cycle of poverty and design new social, legal and political tools and vehicles to move poor people from deprivation, depression, and despair to opportunity, hope and ambition. I do not believe that an "English System" which parcels out the legal problems of the poor to lawyers engaged not because they have a singular dedication to assist poor people but because they are members of the bar association or a lawyer referral panel and somehow "chosen freely" by the poor will ever provide the necessary concerted and thoughtful legal analysis and challenge which must occur if the OEO program will be more than a chain of legal first-aid clinics. Twenty lawyers selected by twenty poor clients on twenty different days to defend eviction notices will never have even the opportunity to learn that every eviction was retaliation for the tenant's complaint of housing violations and so look for the test case to challenge the consequent perversion of the administration of justice. But three lawyers in a "poor man's law firm" would soon see the common thread and seek the legal remedy to prevent the continued proliferation of the same legal crises.

I also entertain the presumption that an "English Plan" is more costly than the provision of free legal services by salaried attorneys. Given a fixed sum of money, I speculate that I could obtain more lawyer assistance by employing a lawyer's full time for a definite period than by dispensing the same money to numerous lawyers in specific fees for services rendered.

But I admit my concerns are speculative. We will approve a very limited number of "English System" applications, evaluate the costs and the results carefully and assess the comparative success of such an approach. We have several preliminary applications for this method; I doubt that we will approve all of them, and I am certain that there is little likelihood that additional applications will be approved. However, we may approve such plans in sparsely populated areas where there is no other reasonable method to provide free legal assistance for the poor.<sup>14</sup>

This, then, is the variety of choices with which the legal profession is presented. But first, it must make the basic decision: shall we participate in this program, or shall we not. This is a decision which the nation has already made.<sup>15</sup>

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<sup>14</sup>Address by E. Clinton Bamberger, National Conference of Bar Presidents in Chicago, Ill., Feb. 1965, in 42 N.D.L. REV. 287, 291-92 (1966).

<sup>15</sup>The difficulties of that decision were described by Orison Marden, President of the A.B.A. at the Justice and the Poor Symposium at Notre Dame Law School in April 1966. His description conveys the agony which faced the bar at the beginnings of the Legal Services Program, when the relevant questions seemed to be:

What is big brother up to now? Is our precious independence in danger?

It may not be immediately apparent that there is a need for a program of legal services for the poor in the South. More than any other region in the country, the South enjoys the benefit of a tradition of individuals dealing with individuals, in which every member of the community is responsible for the welfare of every other person. Perhaps more than anywhere else in America, a feeling of community prevails in the South which seems to minimize the need for the kind of institutionalized assistance for poor people which has been found necessary elsewhere in America.

But this impression does not reflect the entire reality of life in the South. Like the rest of America in the 20th Century, the South is undergoing a rapid and radical transformation of its traditional way of life. The defeat last year of Representative Howard Smith of Virginia, the distinguished Chairman of the House Rules Committee, is one indication of this change. Poor people, who for centuries have been satisfied with modest improvements in the status quo, are no longer satisfied with the pace of change, and are demanding with ever increasing insistence to be allowed to participate in life in 20th Century America—not on the terms laid down for them by politicians, lawyers, and

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Are we going to be "socialized" by snooping "Feds" from Washington? Will the Federal program help or hurt our Legal Aid Society? Will the Federal program compete with the Bar, especially with the struggling neighborhood lawyer?

This was the situation which confronted the national leadership of our profession in late 1964. Lewis F. Powell of Richmond, Virginia, was then President of the American Bar Association . . . . Conservative by nature and environment, he [President Powell] saw the opportunities as well as the dangers in the new program. Should we take off our gloves and fight a program formulated by the Congress of the United States and enthusiastically endorsed by the executive branch of our national government—or stand on the sidelines and pout? The example set by the medical profession was fresh in the minds of all of us.

The proposed program was subjected to careful study by President Powell and other bar leaders. They concluded that if the program were properly implemented along professional lines, it would merely involve financial assistance to local communities for more and better legal aid—a movement which the organized bar had been actively promoting for many years. The precious independence and traditions of our profession would not be in jeopardy so long as the implementing rules which affect the services of lawyers were controlled by the bar. Accordingly, the Board of Governors of the American Bar Association recommended that the organized bar tender good faith cooperation to the OEO and seek participation in creating and directing the program along proper lines. This recommendation was enthusiastically endorsed by the House of Delegates of the A.B.A. in February, 1965.

other members of what they disdainfully refer to as "the establishment," but on their own terms: loudly, actually and massively.

The dilemma posed by the fact that as intelligent men we are deeply concerned about the major changes taking place in our society, and as lawyers we recognize the need to accomplish these changes within the framework of law and order, is raised with particular clarity in the Legal Services Program. Shall lawyers stand back and view, with well-justified alarm, the major changes taking place in America, and particularly in the South? What should be the role of lawyers, raised in one way of life and accustomed to seeing it work with apparent success, suddenly faced with circumstances that seem to mean the end of that way of life? Are our traditional values to be eroded to the point where they actually damage the quality of our civilization?

These are serious questions, and they are particularly serious in the South, where the changes are coming more quickly and dramatically than perhaps anywhere else in the country. It would be foolish to suggest that these questions can be answered easily, but the Legal Services Program has none of the ambivalencies that apply to many of the other changes taking place in America today. In relation to the Legal Services Program, the best way to preserve the traditional values of the South is not to view with alarm their destruction, but to dedicate oneself to the task of giving them expression within the framework of the new institutions. For attorneys, this dedication means active participation in the founding, organization and running of programs of legal services for the poor throughout the South.

Although OEO has funded a number of programs designed for the rural poor, the proportion of these programs in relation to the overall number of funded programs is small indeed, and very little is known about the kinds of legal problems rural poor people have. Certainly, they are different from the legal problems of the poor in the cities. The legal rights of the tenant farmer are different from those of the city slum dweller; rural people have a higher rate of illiteracy than people in the cities, and therefore need more assistance with simple government forms than do city people, and land has an importance in the country that it seldom ever has in the city. These and other legal problems are relatively unique to the countryside, and lawyers in the South, especially small town lawyers, have an ideal opportunity to develop the kind of programs which could serve as an example to the rest of the country.

Unfortunately, the South is no longer a land in which the poor are well cared for by responsible and gracious citizens. Modern technology and the civil rights movement have ended that world forever.

Like the North, the South now has visible and pressing problems: discrimination against Negroes who demand their constitutional rights; miserable and degrading poverty for the white sharecropper; ignorance, illiteracy, and illegitimacy.

The Southern lawyer has a choice when faced with this changing world. Will he turn his back on his region and join the radical element in attacking the federal government and all its works, or will he remain true to the South's noblest traditions and bring to bear upon the legal problems of the poor the grace, humanity, and generosity which has made the South what it is today? Or will he choose the worst alternative of all, remaining silent and inactive while men of lesser learning, wisdom and culture determine the path to be followed by the South of today?

If I am not mistaken, opposition to the Legal Services Program will die, not with a bang, not even with a whimper, but in silence, for lack of a second.

# MISSISSIPPI'S EFFORTS AT INDUSTRIALIZATION: A CRITICAL ANALYSIS

Bill P. Joyner\* and Jon P. Thames\*

## I. INTRODUCTION

This article is written with the avowed intent of criticizing BAWI and related programs. It attempts to establish the existence of a need for re-evaluating the state's long range objectives in encouraging industrialization, and the methods of implementing those objectives.

Much has been written on the value of *Industrialization* and the wisdom of the *BAWI Act*. The words themselves have taken on a glowing significance rivaling that of *motherhood* and *independence*. This is evidenced by their liberal inclusion in political platforms and political speeches.

Not all industries have a desirable long range effect on the state or its economy. Before the state will begin to re-tool its politically controlled industrialization program to enable the state to attract industry that affords such long range benefits it must be confronted with some evidence of public dissatisfaction. It is hoped that this paper will aid in engendering this dissatisfaction, and at the same time convince the reader of the need for his personal support of the state's programs for securing adequate employment opportunity for its people.

## II. BAWI: THE ROLE OF THE A & I BOARD

The state legislature through the prompting of Governor Hugh White enacted Mississippi's first industrial inducement program,<sup>1</sup> and although it has been altered in many respects, that program is in full force and effect today.<sup>2</sup> The purpose of the legislation was to relieve the harsh symptoms of a depression,<sup>3</sup> and its immediate goal was to create jobs by attracting industry.<sup>4</sup> That goal has not changed;<sup>5</sup> however, it has been restricted because of Constitutional prohibitions.<sup>6</sup>

The Mississippi Constitution expressly prohibits the lending of public

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<sup>1</sup>Miss. Laws 1st Ex. Sess. 1936, ch. 1.

<sup>2</sup>Compare Miss. Laws 1st Ex. Sess. 1936, ch. 1, §2, with Miss. CODE ANN. § 8936 (Supp. 1966).

<sup>3</sup>Miss. Laws 1st Ex. Sess. 1936, ch. 1.

<sup>4</sup>*Ibid.*

<sup>5</sup>Miss. CODE ANN. § 8936-05(c) (Supp. 1966).

<sup>6</sup>Mason v. City of Biloxi, 385 U.S. 370 (1966).

credit to a corporation.<sup>7</sup> In order to circumvent this provision the state legislature has been cautious to preface its legislation with language indicating the "necessary and proper" qualities of the various proposals. The initial justification set forth in the 1936 Balance Agriculture With Industry Act was to relieve an acute economic emergency, to increase individual purchasing power, to preserve markets for agricultural products, to prevent the exodus of Mississippi citizens, to utilize local raw materials and natural resources, and to provide adequate employment.<sup>8</sup> With the advent of World War II and with the disappearance of depression conditions it was necessary for the legislature to construct a different public policy peg upon which to hang its justification for BAWI. It found such a peg in the exigencies of converting from war to peace, and in providing employment for veterans.<sup>9</sup> That justification has been retained in the present statute and has been supplemented by language indicating a need for both the protection of health and morals of Mississippi citizens and for the attainment of markets for Mississippi agricultural products.<sup>10</sup>

To carry out the public policy of attracting industry the legislature created a state agency. The agency has been variously titled the Mississippi Industrial Commission,<sup>11</sup> Mississippi Board of Development,<sup>12</sup> and Agricultural and Industrial Board.<sup>13</sup> The state agency primarily responsible for inducing industry into Mississippi today is the Agricultural and Industrial Board.<sup>14</sup>

The composition of the A & I Board has changed greatly over the years. Beginning in 1936 the board's composition was simple. It contained three members, or commissioners as they were then called, selected from the state at large by the Governor.<sup>15</sup> The 1940 legislature saw fit to leave the total membership of the Board unchanged; however, it did provide that members were to be selected from each of three supreme court districts.<sup>16</sup> By 1944 drastic changes were made and the Board's membership increased substantially. The governor, lieutenant governor, speaker of the house, two senators, two representatives,

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<sup>7</sup>MISS. CONST. art. VII, § 183.

<sup>8</sup>MISS. LAWS 1st Ex. Sess. 1936, ch. 1.

<sup>9</sup>MISS. LAWS 1944, ch. 241, § 6.

<sup>10</sup>MISS. CODE ANN. § 8936-05 (Supp. 1966).

<sup>11</sup>MISS. LAWS 1st Ex. Sess. 1936, ch. 1, § 2.

<sup>12</sup>MISS. LAWS 1940, ch. 147, § 1.

<sup>13</sup>MISS. LAWS 1944, ch. 241, § 1.

<sup>14</sup>MISS. CODE ANN. § 8936 (Supp. 1966).

<sup>15</sup>MISS. LAWS 1st Ex. Sess. 1936, ch. 1, § 2.

<sup>16</sup>MISS. LAWS 1940, ch. 147, § 1.

and ten persons from the state at large were all made members, and in addition the state chemist, state geologist, and commissioner of agriculture were allowed to sit as ex-officio members. From the ten members selected from the state at large the governor was to choose one as director.<sup>17</sup> The composition of the Board was not materially altered until 1952 when the selection of the director was not to be made from the membership of the Board.<sup>18</sup> By 1956 the state legislature had again modified the Board's composition and permitted the governor to appoint fifteen members from the state at large.<sup>19</sup> Again in 1966 the Board's membership was increased by legislation authorizing the governor to appoint twenty-five members from the state at large.<sup>20</sup> With the Board's increased membership, from three in 1936 to thirty-five in 1966, has come decreased efficiency on the part of the Director and his executive committee.<sup>21</sup>

The executive committee is the organization within the Board which for all practical purposes conducts the business of the Board.<sup>22</sup> Because the original board, or commission as it was then named, was composed of only three members including the director, there was no necessity for an executive committee. The original Balance Agriculture With Industry Act required that only two members be present to constitute a quorum,<sup>23</sup> and this was not modified by the 1940 legislature.<sup>24</sup> The first executive committee came into existence with the 1944 statute and consisted of the governor, three members of the Board, and the director who was the executive officer.<sup>25</sup> The increased membership necessitated a larger quorum for conducting business, and this was provided. The newly created Board could conduct business only if seven members were present. Further, the governor was made chairman of the Board.<sup>26</sup> In 1952 the director's position on the committee was changed to that of an ex-officio member.<sup>27</sup> The size of the executive

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<sup>17</sup>Miss. Laws 1944, ch. 241, § 1.

<sup>18</sup>Miss. Laws 1952, ch. 171, § 1.

<sup>19</sup>Miss. CODE ANN. § 8936 (1956).

<sup>20</sup>Miss. CODE ANN. § 8936 (Supp. 1966).

<sup>21</sup>Interviews with Mr. William T. Hackett, Jr., Executive Director of the Louisiana Department of Commerce and Industry, in Baton Rouge, Louisiana, July 11, 1966; Mr. Henry Maddox, Executive Director of the Missouri Department of Commerce and Industry, in Jefferson City, Missouri, Aug. 5, 1966.

<sup>22</sup>Interview with Mr. Paul Burt, Assistant Director of Mississippi A & I Board, in Jackson, Aug. 29, 1966.

<sup>23</sup>Miss. Laws 1st Ex. Sess. 1936, ch. 1, § 6.

<sup>24</sup>Miss. Laws 1940, ch. 147, § 1(c).

<sup>25</sup>Miss. Laws 1944, ch. 241, § 1.

<sup>26</sup>Miss. Laws 1944, ch. 241, § 1(c).

<sup>27</sup>Miss. Laws 1952, ch. 171, § 1.

committee did not change until 1966 when five members in addition to the governor and director as ex-officio member were placed on it.<sup>28</sup>

Today there is some doubt and much criticism about increases in the size of both the board and the committee.<sup>29</sup> While present personnel with the A & I Board can find nothing wrong with a large Board and committee,<sup>30</sup> past directors see the system as very impractical.<sup>31</sup> It is submitted that a more efficient agency would exist by reducing its size, rather than expanding it, and by affording the director more authority over the Board's operation.

Since the inception of the BAWI program in 1936 its political significance has become increasingly important.<sup>32</sup> Accordingly, the authority of the Board has increased.<sup>33</sup> Because of this it is somewhat surprising to discover that its director has lost much power over the years. In 1936 the director composed one-third of the membership of the Board, today he is not even a member. With the small size of the original commission there was no necessity for an executive committee. Today the system is too cumbersome and is operated by such a committee which is apparently controlled more by the governor than by the director.<sup>34</sup>

While the director's power has decreased, that of the governor has increased. The legislature did not seem to fear placing almost complete discretion in the hands of the governor for the 1936 Act permitted him to name all board members and designate one to be director.<sup>35</sup>

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<sup>28</sup>MISS. CODE ANN. § 8936 (Supp. 1966).

<sup>29</sup>Interviews with Mr. William T. Hackett, Jr., Executive Director of the Louisiana Department of Commerce and Industry, in Baton Rouge, Louisiana, July 11, 1966; Mr. Henry Maddox, Executive Director of the Missouri Department of Commerce and Industry, in Jefferson City, Missouri, Aug. 5, 1966; Mr. Don Wylie, Chamber of Commerce Manager, Greenville, in Greenville, June 28, 1966.

<sup>30</sup>Interviews with Mr. Gene Triggs, Director, and Mr. Paul Burt, Assistant Director of the Mississippi A & I Board, in Jackson, Aug. 29, 1966.

<sup>31</sup>Interviews with Mr. William T. Hackett, Jr., Executive Director of the Louisiana Department of Commerce and Industry, in Baton Rouge, Louisiana, July 11, 1966; Mr. Henry Maddox, Executive Director of the Missouri Department of Commerce and Industry, in Jefferson City, Missouri, Aug. 5, 1966.

<sup>32</sup>It is not surprising that every gubernatorial candidate since Hugh White has focused a major portion of his campaign on the topic of obtaining industry for Mississippi.

<sup>33</sup>Compare Miss. Laws 1st Ex. Sess. 1936, ch. 1, with MISS. CODE ANN. § 8936 (Supp. 1966).

<sup>34</sup>Interview with Mr. William T. Hackett, Jr., Executive Director of the Louisiana Department of Commerce and Industry, in Baton Rouge, July 11, 1966.

<sup>35</sup>Miss. Laws 1st Ex. Sess. 1936, ch. 1, § 2.

Perhaps this was due to a legislative dependence on the chief executive's office to save Mississippi from the depression. In any event the 1940 Act permitted the Board to select its own director.<sup>36</sup> This might have been of no significance since the governor still appointed Board members and could dispose of them if he saw fit to do so. Further, the director had to look only to the Board's approval when he selected his staff,<sup>37</sup> but once again, the governor was in an envious position from the standpoint of power politics. Major alterations were made by the 1944 Act. It provided for a twenty-member board consisting of the governor and ten others dependent on him for appointment. Out of the remaining nine, three were ex-officio members.<sup>38</sup> The director was to be appointed by the governor from the ten member group<sup>39</sup> and was to be made the executive officer of the executive committee with the governor acting as chairman. Further, under the new legislation it took seven members, instead of the previous two, to constitute a quorum.<sup>40</sup> The legislature in 1952 proceeded further to weaken the position of director. That session saw the A & I Board director lose his positions both on the Board and on the executive committee.<sup>41</sup> The strength of the director continued to ebb when the 1956 legislature added five gubernatorial appointed positions to the Board.<sup>42</sup> This process was continued in 1966 when the legislature added another ten members, bringing the Board's total membership to thirty-five.<sup>43</sup> It also added two new members to the executive committee which diluted the director's influence.<sup>44</sup> The governor retained the authority to approve the director's selection of staff members,<sup>45</sup> such authority having been secured by the governor in 1944.<sup>46</sup> Further, the director was prevented from conducting business on behalf of the Board unless he had a quorum of fifteen,<sup>47</sup> which more than doubled the previous requirement set by the 1944 legislature<sup>48</sup> and retained by its counter-

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<sup>36</sup>Miss. Laws 1940, ch. 147, § 1(a).

<sup>37</sup>Miss. Laws 1940, ch. 147, § 1(b).

<sup>38</sup>Miss. Laws 1944, ch. 241, § 1.

<sup>39</sup>*Ibid.*

<sup>40</sup>Miss. Laws 1944, ch. 241, § 1(c).

<sup>41</sup>The director was not taken completely off the executive committee, but was retained as an ex-officio member. Miss. Laws 1952, ch. 171, § 1.

<sup>42</sup>Miss. CODE ANN. § 8936 (1956).

<sup>43</sup>Miss. CODE ANN. § 8936 (Supp. 1966).

<sup>44</sup>*Ibid.*

<sup>45</sup>Miss. CODE ANN. § 8936(b) (Supp. 1966).

<sup>46</sup>Miss. Laws 1944, ch. 241, § 1(b).

<sup>47</sup>Miss. CODE ANN. § 8936(c) (Supp. 1966).

<sup>48</sup>Miss. Laws 1944, ch. 241, § 1(c).

part in 1956.<sup>49</sup> One of the most far-reaching moves made by the 1966 legislature against the Board as much as against its director was that of conveying A & I Board functions to the newly created Research and Development Center. This required the A & I Board Director to transfer all money, data, records, or other material held by the Board in its City Planning Department to the R & D Center.<sup>50</sup> This legislative pronouncement raised concern among individuals in the field of industrial inducement on the local level. They fear that unless strict legislative guidelines are drawn, in-fighting and confusion among the two state agencies will result, causing a collapse of state proficiency in obtaining industry for Mississippi.<sup>51</sup>

While the role of the director has decreased over the past thirty years that of the Board has increased. The economic complexities of the late twentieth century have demanded more sophisticated tactics on the part of industry seekers. Where Board and Chamber of Commerce members of the 1940's and '50's would ask any and all industrial concerns to locate in a Mississippi community, today the more populated areas of the state are placing emphasis on preparation and planning with the idea of exerting most of the efforts on selected companies.<sup>52</sup> It appears to be too soon to judge the effects of this change in attitude; however, no change in ultimate results appears to have occurred. Some heavy industries have located in the state, but this cannot be attributed to an alteration in inducement techniques.<sup>53</sup> Claims are made that emphasis is being placed on high-wage heavy industry,<sup>54</sup> the results

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<sup>49</sup>MISS. CODE ANN. § 8936(c) (1956).

<sup>50</sup>MISS. CODE ANN. § 8936-02(2) (Supp. 1966).

<sup>51</sup>Interview with Mr. Don Wylie, Chamber of Commerce Manager, Greenville, in Greenville, June 28, 1966. While this view is prevalent on the local level in Mississippi, it is not to be found at the state level. Neither Mr. Paul Burt nor Mr. Gene Triggs intimated any jealousy. See Interviews with Mr. Paul Burt and Mr. Gene Triggs, in Jackson, Aug. 29, 1966.

<sup>52</sup>The older method was called the *shotgun* approach, where the chambers of commerce would initiate a door-knocking, letter-writing campaign aimed at every company that came to mind. The more modern method is the *rifle* approach in which feasibility studies are conducted to determine what type industry is most needed, and what type can best be supported by the area. After this determination is made all efforts are concentrated on industries that meet the study's findings. Interview with Mr. W. D. Bailey, Executive Vice President of the Pascagoula Chamber of Commerce, in Pascagoula, July 18, 1966.

<sup>53</sup>The Standard Oil Refinery in Jackson County is exemplary. While the area claims to have converted to the *rifle* approach, the campaign to acquire Standard Oil Company began a number of years before the *rifle* approach was utilized. Interview with Mr. Albert S. Johnson, Jackson County Port Director, in Pascagoula, July 18, 1966.

<sup>54</sup>Interview with Mr. Gene Triggs, Director of Mississippi A & I Board, in Jackson, Aug. 29, 1966.

lend little justification.<sup>55</sup> There were some heavy industries coming into the state ten or more years ago, but the majority were light-weight, low-wage manufacturing concerns. That trend is still evident.

Not only has there been an attempt at sophistication on the local level, but the state, through expanding the role of the Board, has attempted to keep pace. The original Act was fairly restrictive. It authorized a determination by the Board of whether the prospective industry was necessary under the public policy section of the Act. If it were, a general obligation bond election was permitted and a certificate of public convenience and necessity was granted.<sup>56</sup> If the municipality met all the requisites for holding an election,<sup>57</sup> and if the required number of voters favored the bond issue, the Board gave its approval.<sup>58</sup> The Board was required to hold meetings once a month,<sup>59</sup> and to keep written records of the meetings.<sup>60</sup> To finance this scheme the legislature appropriated the sum of thirty thousand dollars.<sup>61</sup> The 1940 legislature extended the duties of the Board, and it became the Board's responsibility to formulate a comprehensive state master plan, to conduct studies concerning water shed projects, recreation, and crop utilization.<sup>62</sup> Of significant import were provisions in the Act permitting park program surveys<sup>63</sup> and requiring an advertising campaign to sell Mississippi to northern industrialists.<sup>64</sup> It also permitted the Board to assist private groups in conducting feasibility studies.<sup>65</sup> Finally, it required the Board to compile such data as the supply of labor, amount of natural resources, comparative tax benefits, and transportation facilities available to industries interested in locating in Mississippi.<sup>66</sup> For administering the program the Director was to be paid an annual salary of four thousand dollars.<sup>67</sup> To these responsibilities of the Board the 1944 legislature added one requiring the establishment and maintenance of a research laboratory, the purpose

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<sup>55</sup>See MISSISSIPPI A & I BOARD, SUMMARY OF MISSISSIPPI BAWI PLANTS, 1936-Mar. 1966, copy on file in University of Mississippi Law Library (BAWI-File No. 27).

<sup>56</sup>Miss. Laws 1st Ex. Sess. 1936, ch. 1, § 7, 8.

<sup>57</sup>Miss. Laws 1st Ex. Sess. 1936, ch. 1, § 8.

<sup>58</sup>Miss. Laws 1st Ex. Sess. 1936, ch. 1, § 9.

<sup>59</sup>Miss. Laws 1st Ex. Sess. 1936, ch. 1, § 5.

<sup>60</sup>Miss. Laws 1st Ex. Sess. 1936, ch. 1, § 6.

<sup>61</sup>Miss. Laws 1st Ex. Sess. 1936, ch. 2, § 1.

<sup>62</sup>Miss. Laws 1940, ch. 147, § 2.

<sup>63</sup>Miss. Laws 1940, ch. 147, § 2(a).

<sup>64</sup>Miss. Laws 1940, ch. 147, § 6.

<sup>65</sup>Miss. Laws 1940, ch. 147, § 7.

<sup>66</sup>Miss. Laws 1940, ch. 147, § 8.

<sup>67</sup>Miss. Laws 1940, ch. 147, § 1(a).

being to discover new uses for the state's products.<sup>68</sup> It further provided for an increase in the Director's salary from four thousand to six thousand dollars per annum.<sup>69</sup> This sum was increased to seven thousand dollars in 1950,<sup>70</sup> and to eight thousand five hundred dollars in 1952.<sup>71</sup> While in the past the Board was encouraged to cooperate with other agencies,<sup>72</sup> in 1956 it was specifically permitted to utilize any federal money at its disposal.<sup>73</sup> Whether this provision has been used is not known.

The 1966 legislature greatly enlarges the functions of the Board. It authorizes the head of the A & I Board to select a director of youth affairs who will be responsible to the Board. The director of youth affairs is to serve as a liaison with industry and the department of education in an effort to secure jobs for the youth of Mississippi.<sup>74</sup> The A & I Board is given extensive authority and financing to conduct market research, design detailed plant plans, and compile five year feasibility studies.<sup>75</sup> Further, an industrial training revolving fund is created to which newly located or expanding industries may apply for up to twenty thousand dollars which must be repaid to the state by no later than five years from the date of the loan.<sup>76</sup> This, the legislature hopes, will provide skilled labor for anticipated heavy industry.<sup>77</sup> Another major facet of Mississippi's industrial inducement program is the creation of an "Industrial Park Act" and its inclusion within the BAWI program.<sup>78</sup> While the efficacy of a park program is generally applauded,<sup>79</sup> the statute is rarely utilized because of its strict requirements.<sup>80</sup>

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<sup>68</sup>Miss. Laws 1944, ch. 241, § 4.

<sup>69</sup>Miss. Laws 1944, ch. 241, § 1(a).

<sup>70</sup>Miss. Laws 1950, ch. 190, § 1(a).

<sup>71</sup>Miss. Laws 1952, ch. 171, § 1(a).

<sup>72</sup>Miss. Laws 1944, ch. 241, § 3.

<sup>73</sup>Miss. CODE ANN. § 8936(e) (1956). It might be worth noting that indirect use of federal funds had been previously authorized. Miss. Laws 1st Ex. Sess. 1936, ch. 1, § 13.

<sup>74</sup>Miss. CODE ANN. § 8936(b) (Supp. 1966).

<sup>75</sup>Miss. CODE ANN. § 8939-01 (Supp. 1966).

<sup>76</sup>Miss. CODE ANN. §§ 8939-12 to -15 (Supp. 1966).

<sup>77</sup>Interviews with Mr. Paul Burt, Assistant Director of the Mississippi A & I Board, in Jackson, June 20, 1966; Mr. Perry Wingo, Director of the Harrison County Development Commission, in Gulfport, July 19, 1966.

<sup>78</sup>Miss. CODE ANN. §§ 8940-01 to -12 (Supp. 1966).

<sup>79</sup>Interviews with Mr. Don Wylie, Chamber of Commerce Manager, Greenville, in Greenville, June 28, 1966; Mr. Thomas P. Palmer, Executive Vice-President of the Meridian Industrial and Commercial Foundation, in Meridian, July 21, 1966; Mr. Perry Wingo, Director of the Harrison County Development Commission, in Gulfport, July 19, 1966.

<sup>80</sup>Interview with Mr. Don Wylie, Chamber of Commerce Manager, Greenville, in Greenville, June 28, 1966.

The 1964 legislature also established the Mississippi Marketing Council. The council was established within the framework of the A & I Board, but it was made politically independent of it. The purpose of the council is to improve the lot of the farmer by discovery of new uses and markets for farm and forestry products.<sup>81</sup>

The tenor of the present statute leads one to believe that Mississippi has abandoned the philosophy of *take what we can get, a low wage job is better than none at all*. On paper the tone of the statute has changed over the years from one of desperation to one of long range economic planning. A look at the actual operation of the Board and its counterparts on the local level reveals that this is not the case. In fact it is found that the philosophy of 1936 prevails today. What then is the purpose of the Board as expressed or implied by the Act, and how is it being fulfilled?

Basically, the purpose of the Board is to administer the BAWI program under the provisions of the statute. Both its letter and spirit require the Board to exert all energy in convincing industry to locate in Mississippi.

Among the functions of the Board under the BAWI act are advertising, contacting industrial prospects, recommending to the industry those areas of the state that meet its standards, and policing the subsequent contract. Supposedly the Board is in a bargaining position superior to that of the municipality and can thus protect the town from an onerous contract.<sup>82</sup>

If an industry seeking a location site follows the master plan, the following steps will be taken. A company official will notice an A & I Board advertisement or be visited by a representative of the board. His interest aroused, he will request additional information on climate, availability of labor, raw materials and markets, and on available financing arrangements. If this information is acceptable he will give the A & I Board a list of site specifications. The board compares the specifications with the facilities offered by the various Mississippi communities. The communities conforming are suggested as possible sites. A staff member of the board will take the manufacturer's representative to the areas selected and, according to the announced policy of the Board, step back and let the area representative take charge. The municipality is then free to bargain with the industry, subject to approval by the Board.

The above procedure is sometimes followed, but it appears to be the exception, not the rule. The Board personnel contend that most of

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<sup>81</sup>Miss. CODE ANN. §§ 8940-41 to -49 (Supp. 1966).

<sup>82</sup>Interview with Mr. Paul Burt, Assistant Director of the Mississippi A & I Board, in Jackson, June 20, 1966.

the state's industrial prospects are secured directly through the actions of the Board.<sup>83</sup> Of the area development foundation directors and chamber of commerce managers interviewed, only one agreed. Mr. Bill Barrett felt that at least fifty percent of industrial contacts are made through the A & I Board.<sup>84</sup> To illustrate, he produced records that indicated the number of contacts and their source for the months of October, 1965, to July, 1966. The results were as follows:

| Month     | Number of Prospects from* |               |
|-----------|---------------------------|---------------|
|           | A & I Board               | Other Sources |
| Oct. 1965 | 2                         | 2             |
| Nov. 1965 | 0                         | 6             |
| Dec. 1965 | 1                         | 3             |
| Jan. 1966 | 0                         | 5             |
| Feb. 1966 | 1                         | 2             |
| Mar. 1966 | 0                         | 2             |
| Apr. 1966 | 2                         | 3             |
| May 1966  | 1                         | 7             |
| June 1966 | 3                         | 3             |
| July 1966 | 0                         | 1             |
| Total     | 10                        | 34            |

\*Source: Records of North Mississippi Industrial Development Association, West Point, Mississippi.

Area leaders from across the state insist that this picture holds true.<sup>85</sup>

The fact that most industrial prospects are the result of local efforts is not indicative of any lack of effort by the A & I Board. It reflects instead aggressive actions by the local agencies. The existence and productive efforts of such agencies is perhaps the strongest part of the state's program. It is undoubtedly the portion most envied by the industrial development boards of other states.<sup>86</sup> Still, a significant number of industries either have no area contacts or show preference for work-

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<sup>83</sup>*Ibid.*

<sup>84</sup>Interview with Mr. William B. Barrett, Executive Director of the North Mississippi Industrial Development Association, in West Point, Aug. 10, 1966.

<sup>85</sup>Interviews with Mr. Don Wylie, Chamber of Commerce Manager, Greenville, in Greenville, June 28, 1966; Mr. Bob Wheller, Chamber of Commerce Manager, Yazoo City, in Yazoo City, June 30, 1966; Mr. Warren H. Farmer, Chamber of Commerce Manager, Natchez, in Natchez, July 6, 1966.

<sup>86</sup>Interviews with Mr. William T. Hackett, Jr., Executive Director of the Louisiana Department of Commerce and Industry, in Baton Rouge, July 11, 1966; Mr. Henry Maddox, Executive Director of the Missouri Department of Commerce and Industry, in Jefferson City, Missouri, Aug. 5, 1966.

ing through the State Board.<sup>87</sup> Often an industry will desire to remain anonymous until a site is selected.<sup>88</sup> By working through the Board it can consider several areas of the state and choose one without antagonizing other areas and losing possible markets. An industry with no state contacts needs a central clearing house to guide it into the areas most suited for it.

While the fact that most contacts are not a result of the efforts of the Board, it does suggest a need for a re-evaluation of the Board's industry-seeking methods. The Board advertises the state's benefits in a number of publications.<sup>89</sup> The value of these advertisements is questionable.<sup>90</sup> No one dares discontinue them, however, for fear that they do have a significant effect.<sup>91</sup> This dilemma affects other state development boards.<sup>92</sup>

At least one area of the state has decided to dispense with advertisements. Mr. Harry Martin, Tupelo, feels that industries are not impressed with four color brochures.<sup>93</sup> He feels that the most important sources of industrial prospects are local businessmen and local industrialists. One should utilize these sources and use money that was going for advertisements on projects to make the area industrially desirable.<sup>94</sup>

The A & I Board utilizes industry seeking trips. This is particularly effective as a follow-up on industries that have expressed an interest in the state.<sup>95</sup> Many local groups and chambers of commerce also personally visit out-of-state industry. There is a problem of several groups visiting the same prospect.<sup>96</sup> Many times a group will

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<sup>87</sup>Interview with Mr. Paul Burt, Assistant Director of the Mississippi A & I Board, in Jackson, June 20, 1966.

<sup>88</sup>*Ibid.*

<sup>89</sup>These are in the form of spot advertisements in publications such as Wall Street Journal, U.S. News & World Report, Time and Newsweek.

<sup>90</sup>Interview with Mr. Paul Burt, Assistant Director of the Mississippi A & I Board, in Jackson, June 20, 1966.

<sup>91</sup>*Ibid.*

<sup>92</sup>Interviews with Mr. William T. Hackett, Jr., Executive Director of the Louisiana Department of Commerce and Industry, in Baton Rouge, Louisiana, July 11, 1966; Mr. Henry Maddox, Executive Director of Missouri Department of Commerce and Industry, in Jefferson City, Missouri, Aug. 5, 1966.

<sup>93</sup>Interview with Mr. Harry Martin, Director of the Tupelo Community Development Foundation, in Tupelo, Aug. 11, 1966.

<sup>94</sup>*Ibid.*

<sup>95</sup>Interviews with Mr. Gene Triggs, Director, and Mr. Paul Burt, Assistant Director of the Mississippi A & I Board, in Jackson, Aug. 29, 1966.

<sup>96</sup>Interview with Mr. Frank Oakes, Executive Director of the Southwest Mississippi Development District, in McComb, July 13, 1966.

find it follows on the heels of one or two other groups and find the prospects feeling a little harrassed.<sup>97</sup>

Once the Board has an industrial prospect it must decide which areas of the state to refer it to. The industry will supply a list of requirements that limits the Board's choice. Generally, though, there are several possible areas. The Board is very careful not to show preference for any area. Mr. Burt says this is necessary to avoid charges that the Board is "playing politics."<sup>98</sup>

A few areas of the state still admit a hunger for job opportunities.<sup>99</sup> Others can brag of an extremely low unemployment rate and yet would still welcome a new BAWI plant.<sup>100</sup> The Board for fear of charges of bias cannot use its influence to favor the area needing jobs over the area simply willing to accept them.

The Board has been successful in avoiding an appearance of favoritism. One discovered incident of such a feeling was in Yazoo City. Yazoo City seems to feel that the A & I Board is to a large degree controlled by the electric companies.<sup>101</sup> For this reason it feels that the Board discriminates against cities, such as Yazoo City, that own their own generating plants.<sup>102</sup> This criticism seems limited to Yazoo City. No one in the Northeast Mississippi area served by TVA agreed with this contention.<sup>103</sup>

The Board's *political* nature also plays a large role in determining the Board's effectiveness as a policing agent. The town often is willing to agree to unconscionable contract terms in order to secure an industry. The Board is empowered to establish standards to avoid this<sup>104</sup> and to see that those standards are met.<sup>105</sup> The Board's political composition<sup>106</sup> raises the question of its ability or willingness to do this

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<sup>97</sup>*Ibid.*

<sup>98</sup>Interview with Mr. Paul Burt, Assistant Director of the Mississippi A & I Board, in Jackson, June 20, 1966.

<sup>99</sup>Interviews with Hon. Ben M. Stevens, Sr., Mayor of Richton, Mississippi, in Richton, July 20, 1966; Mr. Floyd Sperry, Executive Director of the Columbus-Lowndes Industrial Foundation, Inc., in Columbus, July 22, 1966.

<sup>100</sup>Interview with Mr. W. D. Bailey, Executive Vice-President of the Pascagoula Chamber of Commerce, in Pascagoula, July 18, 1966.

<sup>101</sup>Interview with Mr. Griffin Norquist, County Attorney, Yazoo County, Mississippi, in Yazoo City, July 1, 1966.

<sup>102</sup>*Ibid.*

<sup>103</sup>Interviews with Mr. Harry Martin, Director of the Tupelo Community Development Foundation, in Tupelo, Aug. 11, 1966; Mr. William B. Barrett, Executive Director of the North Mississippi Industrial Development Association, in West Point, Aug. 10, 1966.

<sup>104</sup>MISS. CODE ANN. § 8936-12 (1956).

<sup>105</sup>*Ibid.*

<sup>106</sup>MISS. CODE ANN. § 8936 (Supp. 1966).

if faced with opposition and political pressure. Each of the industry seekers interviewed was asked "Do you think that sufficient political pressure can be brought to force A & I Board approval of a contract that does not meet the requirements set by the Board and by statute?" Three men did not feel this was possible.<sup>107</sup> One of these three felt that the reason it is not possible is the present personnel of the Board. He would prefer a re-organization along less political lines.<sup>108</sup> One former director and two former staff members of the Board stated that they knew for a fact that political pressure had affected Board approval of improper contracts.<sup>109</sup> Clauses allowing the industry to screen subsequent industrial prospects have been approved.<sup>110</sup> Industries with a net worth of less than the Board's standard of one and one-half times the value of the bond issue have been approved.<sup>111</sup> Often this is accomplished by allowing company officers or other companies to sign as sureties.<sup>112</sup> This has been allowed even though that officer's personal capital consists of stock in the company.<sup>113</sup>

The Board has approved contracts for the use of BAWI funds to move an industry from one Mississippi town to another.<sup>114</sup> Such a move prompted a heated response from the town of Picayune. The Chamber of Commerce telegraphed the A & I Board:

Practice of approving bond issues to move industries from one Mississippi town to another not within intent of law. Reso-

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<sup>107</sup>Interviews with Mr. Henry W. Pyne, President of the Hattiesburg Chamber of Commerce, in Hattiesburg, July 15, 1966; Mr. Gene Triggs, Director, and Mr. Paul Burt, Assistant Director of the Mississippi A & I Board, in Jackson, Aug. 29, 1966.

<sup>108</sup>Interview with Mr. Henry W. Pyne, President of the Hattiesburg Chamber of Commerce, in Hattiesburg, July 15, 1966.

<sup>109</sup>Interviews with Mr. William B. Barrett, Executive Director of the North Mississippi Industrial Development Association, in West Point, Aug. 10, 1966; Mr. William T. Hackett, Jr., Executive Director of the Louisiana Department of Commerce and Industry, in Baton Rouge, Louisiana, July 11, 1966; Mr. Henry Maddox, Executive Director of the Missouri Department of Commerce and Industry, in Jefferson City, Missouri, Aug. 5, 1966.

<sup>110</sup>Hamilton Mfg. Co., Attala County, Contract No. 451, 1964; Superior Coach Co., Kosciusko, Contract No. 86, 1951; Baxter Laboratories, Inc., Cleveland, Contract No. 75, 1950, on file in A & I Board office, Jackson.

<sup>111</sup>Alexander Mfg. Co., Yazoo City, Contract No. 402, 1962; Delta Architectural Products, Inc., Cleveland, Contract No. 304, 1959, on file in A & I Board office, Jackson.

<sup>112</sup>Delta Architectural Products, Inc., Cleveland, Contract No. 304, 1959 (contract on file in A & I Board office, Jackson).

<sup>113</sup>Alexander Mfg. Co., Yazoo City, Contract No. 402, 1962, on file in A & I Board office, Jackson.

<sup>114</sup>*Ibid.*

lution opposing this practice to follow. Request you disapprove of any such application or give notice of hearing.<sup>115</sup>

Honorable Granville H. Williams, Mayor of Picayune, wired Mr. Joe Bullock, then Director of the A & I Board:

We have lost one industry [Riley Manufacturing Company<sup>116</sup>] and are about to lose another, both going into another Mississippi city with the support of the A & I approved bond issue. We believe that this is a bad practice and would like to go on record as opposing such.<sup>117</sup>

The *Picayune Item* published an editorial condemning the practice. One paragraph states:

No good purpose will ever be served to aid and abet or certify with a bond issue, a move by one Mississippi community to take an industry away from another Mississippi community. If this is permitted, the BAWI law is a sham and a mockery and chaos will result in state industrial circles. Some industry might move around every ten years taking advantage of the benefits offered. No community would ever be safe from a sister community's actions. The A & I Board has been put on notice from Picayune and it seems to us that a policy should be arrived at, stated and adhered to, to stop this kind of intrastate movement.<sup>118</sup>

The company under consideration, Alexander Manufacturing Company, did not at the time have a net worth equal to the required one and one-half the bond issue.<sup>119</sup> The move from Picayune to Yazoo City was approved. The justification for the move was the company president's contention that he was also considering Louisiana and Arkansas. The Board felt it had to approve the issue to keep the company in Mississippi.<sup>120</sup> Accepting this reasoning virtually eliminates

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<sup>115</sup>Telegram from Picayune Chamber of Commerce to the Mississippi A & I Board, Aug. 29, 1962, on file in A & I Board office, Contract file No. 402.

<sup>116</sup>Raleigh Corp., Raleigh, Contract No. 217, 1956, on file in A & I Board office, Jackson.

<sup>117</sup>Telegram from Hon. Granville H. Williams, Mayor of Picayune, to Mr. Joe Bullock, Director, Mississippi A & I Board, Aug. 30, 1962, on file in A & I Board office, Contract file No. 402.

<sup>118</sup>*Time to Call a Halt to This*, *Picayune Item*, Sept. 6, 1962, p. 2, col. 1.

<sup>119</sup>Alexander Mfg. Co., Yazoo City, Contract No. 402, 1962, on file in A & I Board office, Jackson.

<sup>120</sup>Alexander Mfg. Co., Yazoo City, Contract No. 402, 1962, on file in A & I Board office, Jackson; Interview with Mr. Paul Burt, Assistant Director of the Mississippi A & I Board, in Jackson, Aug. 29, 1966.

any policy against intrastate movement with BAWI funds. If the company desiring to move encounters Board opposition it simply must threaten to move to Arkansas.

The business of industrial inducement is highly competitive; yet, the city organizations and area foundations across the state have a beautiful working relationship. If an industrialist finds he cannot locate in a particular area, the people of the area try hard to sell him on another part of the state.<sup>121</sup> Intrastate movement with BAWI financing jeopardizes this extremely effective system. It can only create sectional jealousies and result in lost industry. The elaborate security measures taken in the Meridian Industrial Development Foundation offices suggest the emergence of this type of sectional jealousies. This office is equipped with a sound proof conference room and telephone lines that will not allow secretaries to listen in.<sup>122</sup>

The BAWI act is for the announced purpose of providing employment.<sup>123</sup> The financing of warehouses and other non-manufacturing establishments is not contemplated by voters approving bond issues.<sup>124</sup> Many of the early contracts made certain that the intent of the act was fulfilled by including clauses providing for a minimum number of employees<sup>125</sup> or minimum annual payroll.<sup>126</sup> Cleaver Brooks, a manufacturer of prefabricated boilers, came into Greenville under BAWI contract.<sup>127</sup> Under the provisions of the contract if the company fails for three years to provide or attempt to provide in "good faith" adequate employment, the city can cancel the lease. Mr. Wylie, Chamber Manager at Greenville, says that Greenville attempts to shoot at a goal of one job created per \$3,500 expended in the BAWI funds.<sup>128</sup> For Cleaver Brooks a one million dollar bond issue was approved and \$650,000 of

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<sup>121</sup>Interviews with Mr. Don Wylie, Chamber of Commerce Manager, Greenville, in Greenville, June 28, 1966; Mr. Frank Oakes, Executive Director of the Southwest Mississippi Development District, in McComb, July 13, 1966.

<sup>122</sup>Interview with Mr. Thomas P. Palmer, Executive Vice-President of the Meridian Industrial and Commercial Foundation, in Meridian, July 21, 1966.

<sup>123</sup>MISS. CODE ANN. § 8936-05 (Supp. 1966).

<sup>124</sup>Interview with Hon. Ben M. Stevens, Sr., Mayor of Richton, Mississippi, in Richton, July 20, 1966. Richton entered an agreement with the intent of acquiring a manufacturing establishment. It found it had purchased a warehouse.

<sup>125</sup>Cleaver-Brooks Co., Greenville, Contract No. 398, 1962, on file in A & I Board office, Jackson.

<sup>126</sup>Mid-South Mfg. Co., Richton, Contract No. 63, 1949, on file in A & I Board office, Jackson.

<sup>127</sup>Cleaver-Brooks Co., Greenville, Contract No. 398, 1962, on file in A & I Board office, Jackson.

<sup>128</sup>Interview with Mr. Don Wylie, Chamber of Commerce Manager, Greenville, in Greenville, June 28, 1966.

bonds sold and applied to the factory site.<sup>129</sup> In the four years since construction the company has never employed more than a dozen people. It averages around eight persons at any one time.<sup>130</sup> If the 3.5 thousand average is applied to the \$650,000, it would appear that Greenville anticipated creating 186 jobs. Greenville has a clause in the contract with the company that protects it in this event, but cannot afford to enforce such clause because of fear of damage to its industrial reputation.<sup>131</sup> Mr. Sperry, Columbus-Lowndes County Chamber Manager, is in agreement with Mr. Wylie that a suit against an industry to enforce such a clause would so damage the industrial reputation of the city that it would actually work a detrimental effect.<sup>132</sup> A smaller city might not be in a position to worry about possible future effects. The need for present jobs and the uncertainty of acquiring additional industry might force the city to attempt to apply such a clause.<sup>133</sup> The larger towns have their reputation to protect, and to them the clause is of no avail.

The A & I Board usually insists upon some form of job protection clause,<sup>134</sup> but this is of little effect. The clauses are, and must be, written with an eye to the practical needs of industry.<sup>135</sup> In most instances the failure to provide the number of jobs promised is simply a problem of business conditions. This certainly seems the case with the Cleaver-Brooks Company.<sup>136</sup> In such an event Greenville, or any other Mississippi city, will not attempt to force the company to move against its business interest.<sup>137</sup> The A & I Board can do little to forestall such problems unless it has reason to expect that the company is bargaining in bad faith.

The A & I Board is in a peculiar position. It is too responsive to political pressure to turn down a city that does not wish to be

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<sup>129</sup>Cleaver-Brooks Co., Greenville, Contract No. 398, 1962, on file in A & I Board office, Jackson.

<sup>130</sup>Interview with Mr. Don Wylie, Chamber of Commerce Manager, Greenville, in Greenville, June 28, 1966.

<sup>131</sup>*Ibid.*

<sup>132</sup>Interview with Mr. Floyd Sperry, Executive Director of Columbus-Lowndes Industrial Foundation, in Columbus, July 22, 1966.

<sup>133</sup>Mid-South Mfg. Co., Richton, Contract No. 63, 1949, on file in A & I Board office, Jackson.

<sup>134</sup>Cleaver-Brooks Co., Greenville, Contract No. 398, 1962, on file in A & I Board office, Jackson.

<sup>135</sup>Interview with Mr. Paul Burt, Assistant Director of the Mississippi A & I Board, in Jackson, Aug. 29, 1966.

<sup>136</sup>Interview with Mr. Don Wylie, Chamber of Commerce Manager, Greenville, in Greenville, June 28, 1966.

<sup>137</sup>*Ibid.*

turned down. It fears people will discover this and so must refuse to give special effort to special problems in order to maintain appearances. As far as the bonding program goes, its beneficial effect is that it is a place for industry that has no other state contacts to begin with, and it enables cities to fulfill at least the letter of the statute.

The Board is staffed by sincere, competent, capable men. They face the same future as Mr. Hackett, Mr. Maddox and Mr. Barrett. Sooner or later they will lose their jobs because they support the wrong candidate.<sup>138</sup> The better ones will do as the above mentioned gentlemen and go into the same business elsewhere, usually another state. Mr. Paul Burt is highly competent and uniformly respected by industrial inducement career men throughout the state. The state can ill afford to lose such a man or to lose, as it now does, the efforts of an A & I Board organized in such a manner as to realize its full potential.

The following sections and the conclusion of this article will attempt to illustrate the need for change and the changes that could be made. These sections shall also point out need for changes in the methods of local officials and industrial development personnel.

### III. INDUSTRIAL PARK ACT

The State Legislature has provided for establishment of industrial districts or "parks."<sup>139</sup> Any municipality can, if proper procedure is followed, acquire and develop land to suit it for immediate construction of an industrial plant. The problem comes in following the procedure.<sup>140</sup> The A & I Board must first be convinced that the park is necessary to the development of the municipality,<sup>141</sup> and the proposed park must conform to requirements established by the Board.<sup>142</sup> These requirements include a comprehensive engineering study and cost analysis.<sup>143</sup> The Board is authorized to contribute up to twenty-five percent (to a maximum of two thousand dollars) of the cost of such a study.<sup>144</sup>

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<sup>138</sup>Interviews with Mr. William B. Barrett, Executive Director of the North Mississippi Development Association, in West Point, Aug. 1966; Mr. William T. Hackett, Jr., Executive Director of the Louisiana Department of Commerce and Industry, in Baton Rouge, Louisiana, July 11, 1966; Mr. Henry Maddox, Executive Director of the Missouri Department of Commerce and Industry, in Jefferson City, Missouri, Aug. 5, 1966.

<sup>139</sup>MISS. CODE ANN. § 8940-01 (Supp. 1966).

<sup>140</sup>Interview with Mr. Don Wyle, Chamber of Commerce Manager, Greenville, in Greenville, June 28, 1966.

<sup>141</sup>MISS. CODE ANN. § 8940-05 (Supp. 1966).

<sup>142</sup>MISS. CODE ANN. § 8940-03 (Supp. 1966).

<sup>143</sup>*Ibid.*

<sup>144</sup>MISS. CODE ANN. § 8940-04 (Supp. 1966).

If the Board is convinced of the necessity of such an endeavor, it will issue a certificate of public convenience and necessity.<sup>145</sup> A hearing before the Board may be necessary before such a decision is made.<sup>146</sup> The factors to be considered are the same as those affecting BAWI issues except as to property valuation.<sup>147</sup> Before the park is approved, it must be shown that the cost will not exceed ten percent of the total assessed valuation of all the property in the municipality.<sup>148</sup> If all factors meet Board approval, the Board then decides the amount of bonds that may be issued, the expenditures that may be made, the property that may be acquired, the terms of the acquisition, and the method of operation of the park.<sup>149</sup> The Industrial Park Act limits disposition of the property.<sup>150</sup> No part of the park may be sold, rented, or leased for an amount that does not fairly reflect the proportionate value that that portion bears to the value of the entire park. The Act also provides for the establishment of park facilities.<sup>151</sup> Municipalities in counties bordering on the Mississippi River are empowered to establish a park in supervisor's districts other than that in which the municipality is located.<sup>152</sup>

The power of eminent domain over twenty-five percent of the park area is available to the municipality if it owns the remaining seventy-five percent or has it under option.<sup>153</sup> If a city can finance the park without a bond issue, it can, as a general proposition, dictate its own operational requirements and dispose of the land as it wishes. If the city cannot finance the park, citizens' committees organized for industrial advancement often can do so.<sup>154</sup>

Yazoo City has a combination of these plans. The city has an inland park and a port facility financed under the Act.<sup>155</sup> It also has land that is owned by the Yazoo County Industrial Betterment Corporation. This group of approximately one hundred and fifty citizens has

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<sup>145</sup>MISS. CODE ANN. § 8940-06 (Supp. 1966).

<sup>146</sup>*Ibid.*

<sup>147</sup>MISS. CODE ANN. § 8940-07 (Supp. 1966).

<sup>148</sup>*Ibid.*

<sup>149</sup>MISS. CODE ANN. § 8940-08 (Supp. 1966).

<sup>150</sup>MISS. CODE ANN. § 8940-07 (Supp. 1966).

<sup>151</sup>MISS. CODE ANN. § 8940-09 (Supp. 1966).

<sup>152</sup>*Ibid.*

<sup>153</sup>MISS. CODE ANN. § 8940-21 (Supp. 1966).

<sup>154</sup>The people of Yazoo County have done so through the Yazoo County Industrial Betterment Corporation.

<sup>155</sup>Interviews with Mr. Bob Wheller, Chamber of Commerce Manager, Yazoo City, in Yazoo City, June 30, 1966; Mr. Griffin Norquist, County Attorney, Yazoo County, Mississippi, in Yazoo City, July 1, 1966.

as its goal assistance to the existing and prospective Yazoo County industries.

The Corporation's purpose in purchasing this land is to have additional land available for industry. If it realizes profit on one piece of land, it is able to use the profit to subsidize the gift of another piece of land to a second industry.<sup>156</sup> It must be noted here that several members of the County Industrial Commission, the President of the Chamber of Commerce, and the County Attorney are all members of the Yazoo County Industrial Betterment Corporation.<sup>157</sup> Mr. Wheeler, Chamber Manager, stated that it was not a profit-making corporation; however, Mr. Norquist revealed that the Internal Revenue Service does not accept such a view. The Internal Revenue Service has listed it as a profit-making corporation.<sup>158</sup> With announcement of the city industrial park the corporation's adjoining land at least doubled in value allowing "half the property to be given away for industrial development, for the money spent could be realized out of the other half."<sup>159</sup> There are certain dangers in such corporations in that there could be a misuse of information. There is no doubt, however, that it is a definite asset to the industrial program of Yazoo City. When an industry comes to Yazoo City, it finds land available and in a location that should prove profitable. The danger is the absence of adequate checks on such a corporation. Maps of the industrial park area make it fairly obvious that the utilities, the spur line, and roadways were installed in such a manner as to serve not only the 150 acre park, but the approximately 600 acres of Yazoo County Industrial Betterment Corporation land surrounding that park. This vastly increases the worth of the land purchased by the corporation. The potential for fraud is impressive, the potential for community service is even greater. Still a community or a community action organization such as Yazoo City's could not be too careful in inserting internal checks.

Greenville has two parks financed by city funds. The first is located on Lake Ferguson and is restricted to water oriented industry.<sup>160</sup> Mr. Don Wiley contends that those industries that will be allowed a site

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<sup>156</sup>*Ibid.*

<sup>157</sup>Interview with Mr. Bob Wheller, Chamber of Commerce Manager, Yazoo City, in Yazoo City, June 30, 1966.

<sup>158</sup>Interviews with Mr. Bob Wheller, Chamber of Commerce Manager, Yazoo City, in Yazoo City, June 30, 1966; Mr. Griffin Norquist, County Attorney, Yazoo County, Mississippi, in Yazoo City, July 1, 1966.

<sup>159</sup>Interview with Mr. Bob Wheller, Chamber of Commerce Manager, Yazoo City, in Yazoo City, June 30, 1966.

<sup>160</sup>GREENVILLE PORT COMMISSION, A PROFITABLE CLIMATE FOR INDUSTRY, on file in the University of Mississippi Law Library (BAWI-File No. 4).

on the water are carefully selected.<sup>161</sup> The other park is located somewhat distant from water and is furnished with utilities, roads, and piped water.<sup>162</sup> This appears to be a program that has been skillfully designed and executed and well administered.. The port facility is designed for expansion as the need arises. Each portion will be completed as the preceding portion is filled.<sup>163</sup>

Harrison County decided to complete its water oriented park all at once. The park in Harrison County covers over 1500 acres and is back several miles from the coast. The canal system is presently being completed, and rail spurs are under construction. All utilities are present including telephone.<sup>164</sup>

The Meridian Industrial Development Commission, under the direction of Mr. Tom Palmer, is in the process of planning seven industrial parks with the purpose of creating a more flexible park system.<sup>165</sup> "In the past," Mr. Palmer said, "communities would put all their eggs into one basket by setting aside some land, providing facilities and then have a prospective industry reject that particular location." This, he felt, was an unnecessary expense.<sup>166</sup> A community must be ready with something concrete when it is after industry and must be prepared to make a definite offer at the time that the company is willing.<sup>167</sup> By providing seven industrial parks Mr. Palmer felt that the desires of almost any type of industry could be met. Through his studies he has found that it would be more desirable to locate certain industries to the north, south, east, or west depending on the wind, soil structure, transportation facilities, and water resources.<sup>168</sup> The seven park system is in line with Meridian's plan for a diversification of industry and Palmer said the foundation is interested in getting into the retail and

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<sup>161</sup>Interview with Mr. Don Wylie, Chamber of Commerce Manager, Greenville, in Greenville, June 28, 1966.

<sup>162</sup>GREENVILLE PORT COMMISSION, A PROFITABLE CLIMATE FOR INDUSTRY, on file in the University of Mississippi Law Library, (BAWI-File No. 4).

<sup>163</sup>Interview with Col. Milton P. Barschdorf, Port Director, Greenville, in Greenville, June 28, 1966.

<sup>164</sup>HARRISON COUNTY DEVELOPMENT COMMISSION, HARRISON INDUSTRIAL SEAWAY, copy on file in University of Mississippi Law Library (BAWI-File No. 6).

<sup>165</sup>MERIDIAN INDUSTRIAL AND COMMERCIAL FOUNDATION, THE "ANALYSIS CONCEPT," copy on file in University of Mississippi Law Library (BAWI-File No. 9).

<sup>166</sup>Interview with Mr. Thomas P. Palmer, Executive Vice-President of Meridian Industrial and Commercial Foundation, in Meridian, July 21, 1966.

<sup>167</sup>MID-MISSISSIPPI DEVELOPMENT DISTRICT AND MERIDIAN INDUSTRIAL AND COMMERCIAL FOUNDATION, SUGGESTED GUIDELINES FOR FUTURE DEVELOPMENT, copy on file in University of Mississippi Law Library (BAWI-File No. 9).

<sup>168</sup>*Ibid.*

wholesale as well as the manufacturing areas of commerce.<sup>169</sup> This effort is being made not only for Meridian, but also for the surrounding area.<sup>170</sup>

Mr. Palmer's long range approach to park planning is admirable. Still, it has certain drawbacks. There is a great deal of reliance on implementation of the Pat Harrison Waterways project. This would have such a major effect on the area that plans for that eventuality are necessary. Plans are also needed, though, for industrial expansion without this project. Certainly Mr. Palmer has such plans; however, he still faces the biggest obstacle to his seven park program. The program as presently conceived involves approximately twenty-five percent of the land within eight miles of downtown Meridian. This is so even though the largest of the seven parks lies outside this radius. The Park Act provides for taking of no more than twenty-five percent of the land needed through eminent domain,<sup>171</sup> and it should prove difficult to accumulate this amount of contiguous property. There may also be community criticism to city or foundation ownership of this amount of property.

Mr. Marvin Wynn, Director of the Forrest County Development Board, intends to use the Act for acquisition of property. Mr. Wynn feels that park programs should go no further than this and that development of the park should await acceptance by the industry.<sup>172</sup>

One is forced to conclude that park development is of greatest use in those communities that can reasonably expect to acquire a number of industries over a relatively short period of time. The program will speed such acquisitions and allow a larger degree of city planning as to their placement. The consensus of those interviewed is that the smaller community should spend its money on community development rather than industrial parks, and those communities that can benefit by the park can maximize those benefits by financing the program outside the provisions of the Industrial Park Act.<sup>173</sup>

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<sup>169</sup>Interview with Mr. Thomas P. Palmer, Executive Vice President of the Meridian Industrial and Commercial Foundation, in Meridian, July 21, 1966.

<sup>170</sup>*Ibid.*

<sup>171</sup>MISS. CODE ANN. § 8940-21 (Supp. 1966).

<sup>172</sup>Interview with Mr. Marvin Wynn, Director of the Forrest County Industrial Development Board, in Hattiesburg, July 15, 1966.

<sup>173</sup>Interviews with Mr. William T. Hackett, Jr., Executive Director of the Louisiana Department of Commerce and Industry, in Baton Rouge, Louisiana, July 11, 1966; Mr. Paul Burt, Assistant Director of the Mississippi A & I Board, in Jackson, June 20, 1966; Mr. Thomas P. Palmer, Executive Vice President of the Meridian Industrial and Commercial Foundation, in Meridian, July 21, 1966.

## IV. VOCATIONAL TRAINING

To increase the average income of the Mississippi worker his average productivity must first be increased. To reach Mississippi's goal of seventy-five percent of the national average annual income by 1975,<sup>174</sup> the average Mississippi worker must produce seventy-five percent of the average of his national counterpart.

Average production in any given job depends on the product manufactured, the tools employed, and the skill of the workman. A large chemical processing plant might require an investment of twenty million dollars and employ one hundred workmen. A garment plant, providing jobs for 600 workmen could be financed for one-half million dollars or less. Of this one-half million dollars less than half might be used for production machinery. In the chemical plant non-production expenses are minimal. The cost of productive machinery per production employee in a chemical plant may well exceed the cost of production machinery for all the employees of the garment plant.<sup>175</sup>

The pay scale and production scale of employees must conform if the company is to profit. If Mississippi is to realize its goal of a larger slice of the prosperity pie for its people, the average wages paid by existing incoming businesses must rise faster than the national average.

Between 1950 and 1960, Mississippi's per capita income fell three hundred and seventy-four dollars further behind the national average per capita income. This is a decrease of almost fifty percent.<sup>176</sup> The R & D center has calculated that to begin nearing the national average the Mississippi per capita income must begin rising at a minimum of one hundred dollars per year.<sup>177</sup> Mississippi's per capita income is fifteen percent lower than Arkansas' or South Carolina's.<sup>178</sup> Effecting this change in Mississippi's rate of increase will require the securing of industry with a high rate of production and subsequent high rate of pay.

There is no long range benefit obtained by securing a new industry

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<sup>174</sup>This is the goal set by the Mississippi Economic Council, MISSISSIPPI RESEARCH AND DEVELOPMENT COUNCIL, ECONOMIC HIGHLIGHTS OF MISSISSIPPI 34 (March, 1966).

<sup>175</sup>Interview with Mr. William T. Hackett, Jr., Executive Director of the Louisiana Department of Commerce and Industry, in Baton Rouge, Louisiana, July 11, 1966.

<sup>176</sup>MISSISSIPPI RESEARCH AND DEVELOPMENT COUNCIL, ECONOMIC HIGHLIGHTS OF MISSISSIPPI 34 (March, 1966).

<sup>177</sup>*Ibid.*

<sup>178</sup>*Id.* at 36.

for an area (assuming the area has no chronic unemployment<sup>179</sup>) if that industry makes no positive contribution to the area's over-all economy. For example, if the average wage in Canton, Mississippi, is \$1.35 an hour, and Canton has an opportunity to secure a new garment mill that promises to pay \$1.35 an hour, where has Canton progressed?<sup>180</sup> True there are more employment "opportunities." The city is now able to keep more of her young people from leaving the area,<sup>181</sup> but those she keeps can look forward to the same sustenance living their fathers endured.<sup>182</sup> Certainly her total annual payroll will rise. The A & I Board, the Employment Security Commission, and the Mississippi Power and Light Company can compile volumes of statistics showing great increases in net annual payrolls and number of jobs in manufacturing.<sup>183</sup> Yet the fact remains that the forty hour a week man is still receiving \$54.00 a week before deductions! There will be an additional amount of money available in the community, and established merchants will increase sales. This effect will not be permanent. Low wages of workers and noticeable prosperity among merchants will soon attract additional marketing establishments and the effect on merchants will be neutralized. This effect can be illustrated thusly: If the prevailing wages in the community are \$500 per month, no man will invest, or long continue, in a business that promises an income of less than \$500 per month. If the prevailing wages are \$250 per month, a grocery that will net \$350 per month is an attraction to anyone with the capital or credit necessary.

The area would of course realize a larger income from tax assessments. City sales tax, for instance, would naturally rise. Remember,

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<sup>179</sup>Certain areas such as Perry and Lowndes Counties, which still claim need for jobs of any nature, might benefit; Interviews with Hon. Ben M. Stevens, Sr., Mayor of Richton, Mississippi, in Richton, July 20, 1966; Mr. Floyd Sperry, Director of Lowndes County Development Foundation, in Columbus, July 22, 1966.

<sup>180</sup>This theory, co-author Joyner feels, has some basic weaknesses. The first is argued by members of the A & I Board to justify locating low-wage industries. They contend a low-wage job is better than no job at all. A second argument is that in areas where there is no chronic unemployment and where an industry paying the prevailing wage rate is located, competition for labor among existing industry will increase pushing the average wage in the locale to a higher level.

<sup>181</sup>Four hundred and thirty-three thousand people left the state between 1950 and 1960. This loss almost entirely offset the state's natural increase for this period. MISSISSIPPI RESEARCH AND DEVELOPMENT CENTER, ECONOMIC HIGHLIGHTS OF MISSISSIPPI 4 (March, 1966).

<sup>182</sup>Compare MISSISSIPPI POWER AND LIGHT COMPANY, INDUSTRIAL FACTS 12 (April 15, 1964) with MISSISSIPPI POWER AND LIGHT COMPANY, INDUSTRIAL FACTS 22 (Aug. 1, 1966).

<sup>183</sup>See MISSISSIPPI POWER AND LIGHT COMPANY, ECONOMIC DATA BY COUNTY (1965 ed.).

though, the plant property is nominally "municipally owned."<sup>184</sup> This means that for the life of the lease the property is not taxed.<sup>185</sup> Also any increase in tax revenue has to be discounted by the cost of providing municipal services (police and fire protection, drainage and sewage facilities, refuse collection, street maintenance, etc.) for the plant proper and for its employees.

The effect that securing a low wage plant will have on future industrial placement must also be considered. The area will no longer have the labor availability necessary for further industrialization. Theoretically this would bar approval of additional BAWI issues, for an adequate labor supply is a prerequisite to the issuance of a certificate of public convenience and necessity.<sup>186</sup> The now-established industrialist will have a vested interest in closing the area to further industrialization.<sup>187</sup> A new plant paying higher wages would necessarily cost him his most proficient employees. New industry could confront the established manufacturer with labor problems, competition for raw materials and markets, and a greatly reduced and "second-best" labor pool (the plant with the highest wages will naturally get first choice of laborers).

Anyone doubting that manufacturers are strongly influenced by these fears need only look to the BAWI lease contracts Mississippi municipalities have accepted.<sup>188</sup> Many of the BAWI contracts give the manufacturers authority to screen any incoming industry and veto any action it does not approve. Quite prevalent are "gentlemen agreements" between the industry and community leaders. These work the same effect as exclusion clauses.<sup>189</sup> Cleveland, Mississippi, offers an excellent example of a town stymied in efforts at procuring industry by the reticence of an established manufacturer.<sup>190</sup>

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<sup>184</sup>MISS. CODE ANN. § 8936-21 (1956).

<sup>185</sup>*Ibid.*

<sup>186</sup>MISS. CODE ANN. § 8936-08 (1956).

<sup>187</sup>Interview with Mr. Don Wylie, Chamber of Commerce Manager, Greenville, in Greenville, June 28, 1966. Mr. Wylie feels that Cleveland, Mississippi, offered an excellent example of this.

<sup>188</sup>Superior Coach Co., Kosciusko, Contract No. 86, 1951, on file in A & I Board office, Jackson.

<sup>189</sup>Interviews with Mr. Bob Wheller, Chamber of Commerce Manager, Yazoo City, in Yazoo City, June 30, 1966; Mr. Don A. Newton, Director of Industrial and Community Development Department of the Delta Council, in Stoneville, June 29, 1966.

<sup>190</sup>Interviews with Mr. Don Wylie, Chamber of Commerce Manager, Greenville, in Greenville, June 28, 1966; Confidential Interview with prominent Cleveland, Mississippi, merchant, June 27, 1966, text of interview on file in the University of Mississippi Law Library (BAWI-File No. 2).

The obvious rebuttal to this line of thought is: It's not a matter of getting what we want, it's a matter of taking what we can get! The answer to this is: Find what steps must be taken to enable Mississippi to *get what she wants* and then take them.

Perhaps the first step is provided by nature. Mississippi's climate is mild, resulting in lower construction and operating cost for industry.<sup>191</sup> Mr. Perry Wingo suggests the state's climate will be a great benefit beyond the cost aspects. He contends the resource manufacturers are fast becoming most interested in highly trained talent. Since no area is likely to provide the multitude of highly specialized skills needed in modern manufacture, manufacturers must choose to locate in an area that will offer an attraction to such specialists.<sup>192</sup> Mr. Wingo contends that Biloxi, Mississippi, offers one of the country's best prospects for successful realty speculation.<sup>193</sup>

There is much speculation about the effect the proposed Pat Harrison Waterway project would have on the state. Mr. James Brown sees fantastic economic progress for Mississippi if this project is effected.<sup>194</sup> His prognosis might prove a bit ambitious in forecasting the benefits of the new "trade route." Mr. Brown's emphasis seems to be on the value this route will have in expanding the market of northern manufacturers. Mississippi, by virtue of its position astride this route, would then prosper from this trade. Perhaps the transportation facilities the project would provide might prove more beneficial as a source of market expansion to the north for Mississippi manufacturers. In any event there is no doubt that projects like the Pat Harrison Waterways system would be of great benefit to the state of Mississippi,<sup>195</sup> however, they must await the desires of the Federal Government.

The step Mississippi now needs to take involves raising the educational and vocational skill level of her people.<sup>196</sup> The available labor

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<sup>191</sup>Interview with Mr. Thomas P. Palmer, Executive Vice-President of Meridian Industrial and Commercial Foundation, in Meridian, July 21, 1966.

<sup>192</sup>Interview with Mr. Perry Wingo, Director of the Harrison County Industrial Development Commission, in Gulfport, July 19, 1966.

<sup>193</sup>*Ibid.*

<sup>194</sup>38 Miss. L.J. (May, 1967).

<sup>195</sup>Interviews with Mr. Perry Wingo, Director of Harrison County Industrial Development Commission, in Gulfport, July 19, 1966; Mr. Thomas P. Palmer, Executive Vice-President of Meridian Industrial and Commercial Foundation, in Meridian, July 21, 1966.

<sup>196</sup>Interviews with Mr. Oliver Emerich, Editor, The McComb Enterprise-Journal, in McComb, July 13, 1966; Mr. Hodding Carter, III, Editor, The Delta Democrat-Times, Greenville, in Greenville, June 28, 1966; Mr. Bob Wheller, Chamber of Commerce Manager, Yazoo City, in Yazoo City, June 30, 1966.

in a given area is one of the basic requirements of incoming industry. The skills available to a large degree control the quality of industry prospects.<sup>197</sup>

The state legislature has recognized this need for vocational training and has attempted to provide for it. The Mississippi Junior College Vocational and Technical Training Act<sup>198</sup> allows junior colleges seeking a training program to make application to the Junior College Commission, State Building Commission and A & I Board<sup>199</sup> for funds. If the A & I Board determines there is a need for the program, facilities, and equipment applied for, it issues a certificate of necessity to the Junior College Commission for further processing.<sup>200</sup> So far at least twelve of the state's seventeen junior colleges have taken advantage of the Act.<sup>201</sup>

The legislature also enacted the Industrial Training Act of 1964.<sup>202</sup> The A & I Board as administrator of the fund is authorized to loan a new or expanding industry up to \$20,000 for recruitment and training of employees.<sup>203</sup> The loan cannot exceed five years duration.<sup>204</sup> To qualify for the loan a company must have a net worth equal to A & I Board prerequisites,<sup>205</sup> and it must submit a detailed plan of its training needs and the amount of funds required.<sup>206</sup>

Both of these legislative attempts are subject to a good deal of criticism, not as to spirit and intent, but as to mechanics and effect.<sup>207</sup> Loans for training are not overly effective in that the delay and expense are too great.<sup>208</sup> This can best be seen by comparing this plan to that of Georgia. The Georgia Department of Industry publishes an advertisement that states:

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<sup>197</sup>Interview with Mr. William T. Hackett, Jr., Executive Director of the Louisiana Department of Commerce and Industry, in Baton Rouge, Louisiana, July 11, 1966.

<sup>198</sup>Miss. Laws 1964, ch. 401.

<sup>199</sup>Miss. Laws 1964, ch. 401, § 5.

<sup>200</sup>*Ibid.*

<sup>201</sup>MISSISSIPPI A & I BOARD, MISSISSIPPI INDUSTRIAL LOCATION INFORMATION 9, a copy of this booklet is on file in University of Mississippi Law Library (BAWI-File No. 27).

<sup>202</sup>MISS. CODE ANN. § 8939-11 (Supp. 1966).

<sup>203</sup>MISS. CODE ANN. § 8939-14 (Supp. 1966).

<sup>204</sup>MISS. CODE ANN. § 8939-14(c) (Supp. 1966).

<sup>205</sup>MISS. CODE ANN. § 8939-14(a) (Supp. 1966).

<sup>206</sup>MISS. CODE ANN. § 8939-14(b) (Supp. 1966).

<sup>207</sup>Interviews with Mr. William T. Hackett, Jr., Executive Director of the Louisiana Department of Commerce and Industry, in Baton Rouge, Louisiana, July 11, 1966; Mr. Bob Wheller, Chamber of Commerce Manager, Yazoo City, in Yazoo City, June 30, 1966.

<sup>208</sup>Interview with Mr. Gene Wallace, Attorney for the Louisiana Department of Commerce and Industry, in Baton Rouge, Louisiana, July 11, 1966.

When you move your plant to Georgia, you can order whatever trained labor you'll need. Area Vocational Technical Schools—24 million dollars worth—are strategically located throughout the state. These schools will train new labor or retrain seasoned workers in: skilled trades/health occupations/office occupations/technical occupations.

Georgia's Area Vocational Technical Schools will add any course you specify to train workers for your Georgia plant. You supply the need—the State of Georgia will provide the teachers and the facilities.<sup>209</sup>

Mississippi's loan plan pales into insignificance beside Georgia's offer. Not only must the Mississippi manufacturer train his labor at his own expense, often he must do so outside the state. In Georgia the training will be provided at state expense.

If Mississippi's plan is an attempt at a dispositive solution, it is self-defeating. Twenty thousand dollars is insufficient to purchase the necessary machinery to train workers in skills of greater complexity than that of sewing machine operators.

The Vocational and Technical Training Act is also inadequate in that it is not as responsive as it might be to current industry needs. As one man put it, "The vocational courses in Louisiana and Mississippi are turning out specialists in body work on 1931 Cord automobiles."<sup>210</sup> This is undoubtedly overstated; however, there is a need for centralized control of the state's vocational training facilities that will be responsive to existent and anticipated industrial requirements.<sup>211</sup> There is a consensus among industry seekers that there must be a massive expansion of vocational education.<sup>212</sup> Most believe that the expansion necessarily must be linked with an intensive program of technical training on the high school level.<sup>213</sup> This, they contend, is necessary to increase the number of students that want this program, and to raise the quality of the graduate. Many of the people interviewed shared the opinion

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<sup>209</sup>GEORGIA DEPARTMENT OF INDUSTRY AND TRADE, SCHOOL BOYS! (advertisement), copy on file in University of Mississippi Law Library (BAWI-File No. 22).

<sup>210</sup>Interview with Mr. Gene Wallace, Attorney for the Louisiana Department of Commerce and Industry, in Baton Rouge, Louisiana, July 11, 1966.

<sup>211</sup>Interview with Mr. Don Wyle, Chamber of Commerce Manager, Greenville, in Greenville, June 28, 1966.

<sup>212</sup>Interviews with Mr. Paul Burt, Assistant Director of the Mississippi A & I Board, in Jackson, June 20, 1966; Mr. Henry W. Pyne, President of the Hattiesburg Chamber of Commerce, in Hattiesburg, July 15, 1966; Mr. Floyd Sperry, Executive Director of Columbus-Lowndes Industrial Foundation, in Columbus, July 22, 1966.

<sup>213</sup>Interview with Mr. Bob Wheller, Chamber of Commerce Manager, Yazoo City, in Yazoo City, June 30, 1966; Mr. Warren H. Farmer, Chamber of Commerce Manager, Natchez, in Natchez, July 6, 1966; Mr. Henry Maddox, Executive Director of the Missouri Department of Commerce and Industry, in Jefferson City, Missouri, Aug. 5, 1966.

that Mississippians have held as their notion of success a gentleman farmer with a *classical* education.<sup>214</sup> They believe that this point of view has been held for so long that it is almost impossible to convince the student that the highly paid and highly skilled tool and die maker is a successful and productive member of society. This abhorrence of "blue collar" work greatly inhibits development of technically oriented high schools and, indeed, the entire vocational training program.

If re-education is necessary to convince the people of the state that a ten thousand dollar a year machine operator's job is just as honorable and twice as profitable as a five thousand dollar a year assistant office manager's job, the process had better begin. This, as well as the other steps involved, is going to take time. Every year Mississippi waits it loses heavy industry to states like Georgia that see a need and fill it.

As mentioned above, productivity in any given job depends upon the product manufactured, the tools employed and the skill of the workman using those tools. It is true that the product involved controls the tools that will be employed. It is equally true that skill of the workman determines the advisability of investing large sums in sophisticated tools. It is also true that Mississippi desperately needs this type investment. To get it the state must provide qualified man power.

The argument for spending money to attract primarily low wage industry through subsidies is also used against providing technical education. That is, Mississippi should do all that is practically possible to keep its people in the state. Why spend Mississippi funds to train the state's young people for positions in Detroit, Huntsville, and Baton Rouge? Instead, continue to provide jobs that require no training. The self-defeating effect of this line of thought is apparent. Why should the state be saddened if a young Mississippian leaves for a job with twice the salary of any offered here?

The obvious solution is to provide the training, and then industry will actively seek to take advantage by locating in the state. The state then will have better jobs to offer its people and will be able to retain its highly skilled citizenry.

To provide adequate training certain steps must be taken. The state's vocational and technical training facilities need central guidance.<sup>215</sup> The high school, junior college, and college programs must be

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<sup>214</sup>Interview with Mr. Hodding Carter, III, Editor, The Delta Democrat-Times, Greenville, in Greenville, June 28, 1966.

<sup>215</sup>Interviews with Mr. Paul Burt, Assistant Director of the Mississippi A & I Board, in Jackson, June 20, 1966; Mr. William T. Hackett, Jr., Executive Director of the Louisiana Department of Commerce and Industry, in Baton Rouge, Louisiana, July 11, 1966.

integrated to provide the maximum training for the minimum cost to state and student. This integration would allow the student to advance as far and as fast as possible. It would also allow course planning best suited for the state's existent and anticipated industry.

The goals of such a program would have to range further into the future than the life expectancy of a single administration. This would indicate that control of such a program should be divorced from the A & I Board as presently constituted.

To take full advantage of the program the industry-seeking apparatus of the state must concentrate on companies that can provide the type jobs these students will seek.<sup>216</sup> The practice of selling "cheap labor" must stop.<sup>217</sup> Mississippi's skilled and highly productive craftsmen must instead be given the publicity.

Any delay in promotion of such a program will result in a tremendous waste of Mississippi's greatest natural resource—her trainable workers.

#### V. ADVERTISING IN INDUSTRIAL INDUCEMENT

It is impossible to properly evaluate the total effect of advertisements in the field of industrial inducement.<sup>218</sup> No attempt shall be made. However, the type of advertisement and the appeal the advertisement makes is open to some criticism.

Criticism seems to center around the fact that the advertisements are selling Mississippi short.<sup>219</sup> The theme of advertisements is often "Don't look at the Mississippi laborer in terms of production per man-hour, consider him instead in terms of production per dollar spent."<sup>220</sup>

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<sup>216</sup>Interview with Mr. Gene Wallace, Attorney for the Louisiana Department of Commerce and Industry, in Baton Rouge, Louisiana, July 11, 1966.

<sup>217</sup>See MISSISSIPPI POWER AND LIGHT COMPANY, INDUSTRIAL FACTS 11 (1964 ed.).

<sup>218</sup>Interviews with Mr. William T. Hackett, Jr., Executive Director of the Louisiana Department of Commerce and Industry, in Baton Rouge, Louisiana, July 11, 1966; Mr. Henry Maddox, Executive Director of the Missouri Department of Commerce and Industry, in Jefferson City, Missouri, Aug. 5, 1966; Mr. Gene Triggs, Director and Mr. Paul Burt, Assistant Director of the Mississippi A & I Board, in Jackson, Aug. 29, 1966.

<sup>219</sup>Interviews with Mr. William T. Hackett, Jr., Executive Director of the Louisiana Department of Commerce and Industry, in Baton Rouge, July 11, 1966; Mr. Don Wylie, Chamber of Commerce Manager, Greenville, in Greenville, June 28, 1966. *Contra*, Interviews with Mr. Don A. Newton, Director of Industrial and Community Development Department of the Delta Council, in Stoneville, June 29, 1966; Mr. W. E. Ainsworth, Jr., Development Analyst, Mississippi Power and Light Company, in Jackson, Aug. 29, 1966.

<sup>220</sup>DELTA COUNCIL, FACTS ON NORTHWEST MISSISSIPPI 9, on file in the University of Mississippi Law Library (BAWI-File No. 18).

Dr. Don Newton of Delta Council states, "You can't get as much out of him, you have got a lot of them that don't work, a lot that can't and a lot that just won't. But when you think how little you have to pay, think about how much you realize per dollar."<sup>221</sup>

Mississippi Power and Light Company has been a particular offender with its booklets entitled "Industrial Facts." It lists all the states of the union and the average per dollar rate. In bold black letters it sets out Mississippi and shows a \$1.69 per hour rate.<sup>222</sup> This is an economic reality, something that must be pointed out and something that Mississippi must live with or do something about. Still it seems a disservice to the state to sell that wage rate and suggest to the employer that he is morally justified in keeping the Mississippi laborer at sustenance level. In a section of this "Industrial Facts" booklet the Mississippi Power and Light Company suggests certain factors that in their opinion justify the rate. They say, "When all factors behind the cost of living in Mississippi are considered, it is felt that the rates are adequate."<sup>223</sup> Under this quote there are a series of supporting "facts." Some of the "facts" are not in dispute. All agree that because of the state's mild climate construction, maintenance, and heating of homes is less expensive here than in Maine. But this is no justification for paying Mississippians wages that averaged at the time of the Mississippi Power and Light Company publication twenty percent less than Alabama's, fourteen percent less than Tennessee's, and thirty percent less than Louisiana's.<sup>224</sup>

The company's other attempts at rationalization for low wages have even less basis in fact. One such effort was, "With plenty of space, gardens will be found at practically every home supplementing cash income."<sup>225</sup> This statement is coupled with others such as, "Natural recreation is available year round, this item is also inexpensive."<sup>226</sup> (Those cognizant of the cost of hunting and fishing might well disagree.) The booklet suggests that since Mississippi rural labor pools its transportation, this item is less expensive than in a large industrial center.<sup>227</sup> One would think that this practice is not unknown outside the state.

The contention that does the state and its people the greatest disservice is this booklet's declaration that this "rural labor would usually con-

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<sup>221</sup>Interview with Mr. Don A. Newton, Director of Industrial and Community Development Department of the Delta Council, in Stoneville, June 29, 1966.

<sup>222</sup>MISSISSIPPI POWER AND LIGHT COMPANY, *INDUSTRIAL FACTS* 12 (1964 ed.).

<sup>223</sup>*Id.* at 11.

<sup>224</sup>*Id.* at 12.

<sup>225</sup>*Id.* at 11.

<sup>226</sup>*Ibid.*

<sup>227</sup>*Ibid.*

sist of wives, sons and daughters, and farmers living on the farm and working in the plant. To these families the wages of the plant worker are supplementing farm income and in most cases will mean extra dollars over and above the *accustomed existence*.<sup>228</sup> It is appalling that a Mississippian or a Mississippi company would suggest that anyone adopt such an attitude. The idea that a man's salary should be pegged to that amount necessary for his minimum survival rather than to his level of production offends notions of free enterprise and common sense. If an employee decides to use his off-job time in such a way as to provide additional income for his family, there appears to be no justice in reducing his salary assuming his production is not reduced.

The Industrial Development Department of Mississippi Power and Light Company contends that it has shifted its emphasis away from this type of advertisement,<sup>229</sup> and the 1966 edition of "Industrial Facts" has altered the section substantially.<sup>230</sup> While it no longer offers a formula for rationalization, it does again devote a page to a comparison of Mississippi's wage scale to that of other states.<sup>231</sup>

Mississippi Power and Light Company's advertisement of the BAWI bonding system has also undergone a promising change. In 1964 the promotion was:

Last but not least is that after the industry locates, the people will cooperate in seeing that a successful operation results, for in reality by voting for such bond financing they have placed a mortgage on their homes to invest in the industrial property, so occupied by the new industry, or the expansion of an existing industrial enterprise.<sup>232</sup>

While the contention that a BAWI issue puts all the homes in the community under mortgage is not technically correct, in some of the smaller communities it is correct in fact. This is true to the degree that it forces property owners to assist in assuring a profitable operation for the plant that will keep it there at least until the bonds are amortized. Industry's willingness to use this condition is indicated in the discussion on BAWI and organized labor.<sup>233</sup> Even granting this truth in fact, it is

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<sup>228</sup>*Ibid.*

<sup>229</sup>Interview with Mr. W. E. Ainsworth, Jr., Development Analyst, Mississippi Power and Light Company, in Jackson, Aug. 29, 1966.

<sup>230</sup>*Compare*, MISSISSIPPI POWER AND LIGHT COMPANY, INDUSTRIAL FACTS 11 (1964 ed.) *with* MISSISSIPPI POWER AND LIGHT COMPANY, INDUSTRIAL FACTS 21 (1966 ed.).

<sup>231</sup>MISSISSIPPI POWER AND LIGHT COMPANY, INDUSTRIAL FACTS 22-23 (1966 ed.).

<sup>232</sup>MISSISSIPPI POWER AND LIGHT COMPANY, INDUSTRIAL FACTS 26 (1964 ed.).

<sup>233</sup>See Sec. VII of this article.

unwise to encourage industry to locate with the intention of using this inequitable position. Official and pseudo-official advertisements pointing out this power seem to sanction an industry's efforts to *get a town by the tail*.

The 1966 promotion takes the following eminently preferable approach:

Intangible benefits for both communities and industries using BAWI are derived from the fact that citizens are given an opportunity to participate in their own economic development by encouraging industrial enterprises. Voting for the bonds with which industrial sites or buildings are financed amounts to a vote of confidence and expresses the desire of the people to have that industry as a part of their community.<sup>234</sup>

*Facts on Northwest Mississippi*, a publication of the Delta Council, parrots the Mississippi Power and Light Company publications, though it is somewhat more explicit in its promise of aid in keeping wages down and unions out. This publication states:

The research staff of Delta Council makes specific studies to determine which localities can supply the amount and kind of labor required by the proposed plant. These studies are made not only to assist the "prospect" but to be sure that new plants will not be put in the position of having to "fight for labor" with already established employers. The objective of the Delta Council is to insure steady and harmonious growth for new and existing industry.<sup>235</sup>

This promise of freedom from labor competition is in direct opposition to this article's contentions of the necessary role of municipal financing.

This Delta Council publication evidences Mr. Newton's contention that one should consider the Mississippi worker's productivity in terms of "units per dollar" rather than "units per hour." It states, "Manufacturers with branch operations in this area say that costs per unit are consistently lower in their Mississippi plants. Some of the reasons for this increase in productivity are utilization of more modern plants and equipment and better worker acceptance of management's procedures and standards."<sup>236</sup>

The 1966 edition of Mississippi Power and Light Company's booklet deserves praise for inclusion of a section attesting to the Mississippi

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<sup>234</sup>MISSISSIPPI POWER AND LIGHT COMPANY, INDUSTRIAL FACTS 21-22 (1966 ed.).

<sup>235</sup>DELTA COUNCIL, FACTS ON NORTHWEST MISSISSIPPI 8, on file in the University of Mississippi Law Library (BAWI-File No. 18).

<sup>236</sup>*Id.* at 9.

workers' productive capacity. This section includes testimonials from Pathfinder Coach Division-Superior Coach Company, Kosciusko, Mississippi; Armstrong Tire and Rubber Company, Natchez, Mississippi; R. G. LeTourneau Company, Inc., Vicksburg, Mississippi; and The Griffin Lamp Company, Shelby, Mississippi.<sup>237</sup>

This is, in general, the type of advertisement that is needed. There is, though, room for improvement even here. The testimonials when read together seem to indicate a "passive," if productive, work force. The preface to the section speaks of ". . . the harmony existing between management and labor."<sup>238</sup> The Armstrong Tire and Rubber Company praises its employees for, "They all seem to have the right attitude and are willing to learn and work with management 100%," they are "All-American."<sup>239</sup> The Griffin Lamp Company's workers are cited because "The quality is very high and everybody is most willing to contribute a full day's work for a day's pay."<sup>240</sup> The R. G. LeTourneau Company, Inc., is happy with its employees, for:

. . . while Southern labor is capable of learning quite as rapidly as that from other sections, we find Mississippi labor reasonably acceptable to working at "trainee" wages until they reach proficiency . . . it is with pride that I can report that many of our men are approaching the capabilities of any to be found in the industrial sections of the country.<sup>241</sup>

This high praise holds great promise for the prospective industrialist, especially when considered in light of Superior Coach Company's contention that:

. . . the quality of workmanship in the Pathfinder bus in Kosciusko was far superior to the one that was built in Lima [Ohio]. Bear in mind that only a few short months ago all of the people now working here were not experienced in this type of work.<sup>242</sup>

The LeTourneau Company has been in production in Mississippi for many years.

Advertisements pointing out the Mississippi worker's productivity are commendable. It is suggested, however, that these be worded to

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<sup>237</sup>MISSISSIPPI POWER AND LIGHT COMPANY, INDUSTRIAL FACTS 21-22 (1966 ed.).

<sup>238</sup>*Id.* at 21.

<sup>239</sup>*Id.* at 21.

<sup>240</sup>*Id.* at 22.

<sup>241</sup>*Id.* at 21-22.

<sup>242</sup>*Id.* at 21.

point out his willingness to give a full day's work for a *full* day's pay. Any suggestion that he will passively accept less should be deleted.

It is this article's contention that there is no factual indication that the Mississippi worker, given comparative training and production equipment, cannot compete with any other worker on a unit per hour scale.

#### VI. ABSENCE OF CRITICISM IN BAWI PROGRAM

Hodding Carter, III, editor of the Delta Democrat Times, Greenville, Mississippi, admitted emphasizing the merits of the BAWI Program in his newspaper without benefit of all the facts.<sup>243</sup> Mr. Carter said a newspaper has an obligation to the public to print the truth as the paper sees it, but honesty requires the paper have the facts at its disposal before printing. Mr. Carter said he would not take a stand one way or the other in the future until such facts were put before him. The approach previously taken by the Delta Democrat Times is indicative of that taken all across the state,<sup>244</sup> and is reflected in the election returns.<sup>245</sup> It is indeed rare to find more than a mere handful of votes against a BAWI bond proposal.

Once town officials discover that a particular industry is interested in locating in the town, the municipal officials, the Chamber of Commerce, and local industrial inducement committees immediately begin an organized campaign to win community approval.<sup>246</sup> Mr. Paul Burke, assistant director of the A & I Board contends that the success or failure of a bond issue election depends largely on the local community, and further, that the A & I Board plays no part in encouraging community acceptance.<sup>247</sup> However, the Board undoubtedly offers certain types of technical assistance in the passage of the bond issue.<sup>248</sup> It also provides material explaining how to organize a campaign to insure a successful election. This is evidenced by a booklet entitled "Attitude in Action," a program to insure a successful election prepared and distributed by

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<sup>243</sup>Interview with Mr. Hodding Carter, III, Editor, The Delta Democrat-Times, Greenville, in Greenville, June 28, 1966.

<sup>244</sup>Interview with Rev. Erving Burnett, Pastor of Lyon Episcopal Church, in Lyon, June 27, 1966.

<sup>245</sup>MISSISSIPPI A & I BOARD, SUMMARY OF BAWI PLANTS, 1936-March 1966, on file in University of Mississippi Law Library (BAWI-File No. 27).

<sup>246</sup>MISSISSIPPI A & I BOARD, ALTITUDE IN ACTION, on file in University of Mississippi Law Library (BAWI-File No. 27).

<sup>247</sup>Interview with Mr. Paul Burt, Assistant Director of the Mississippi A & I Board, in Jackson, June 20, 1966.

<sup>248</sup>Interview with Hon. Ben M. Stevens, Sr., Mayor of Richton, Mississippi, in Richton, July 20, 1966.

the Mississippi Agricultural and Industrial Board. The booklet suggests a BAWI Action Committee.<sup>249</sup> This group really does not begin its work until all the legal niceties are completed. Not only does the A & I Board insist, through its action committee, that the election be successful, but it demands that it must be an overwhelming success in order to adequately demonstrate community acceptance. The A & I Board contends that a large turnout and a large affirmative vote convinces the industry that the community has a wholesome and progressive attitude toward industrial development.<sup>250</sup>

The purpose of the Action Committee is organization of other committees, as follows: (1) businessmen's group; (2) farm committee; (3) women's vote committee; (4) speaker's bureau; (5) local publicity committee; and (6) telephone committee.<sup>251</sup> The "businessmen's group" is a committee formed for the purpose of contacting the local merchants and businessmen in the area and convincing them of the desirability of obtaining a new industry. The "farm committee" is organized for the purpose of contacting farmers and inviting them to attend a town meeting. The argument given to the farmers in order to convince them to vote for the bond issue is that it will provide employment for the sons and daughters of the farmer, and it will lead to the creation of a better market for the farm produce. The "women's vote committee" is obviously organized to convince the women of the necessity of voting for the proposed bond issue. The key selling point here is that new industry under the BAWI Program will lead to better schools, better civic programs, and increased social benefits for the community. The "speaker's bureau" is made up of influential people in the community who are asked to give speeches before civic groups and organizations for the purpose of selling the community on the project. It is important that the members of the speaker's bureau be influential and that their opinions carry weight in the community.

Finally, the "telephone committee" is established if there is doubt that the bond election will succeed. This is a last ditch effort by proponents of the industry to guarantee passage of the bond issue. Where it appears there are some votes against the bond issue or it appears the needed majority has not turned out to vote, housewives are asked to check the voter roll against those who have actually voted in order to find those who have failed to vote. Those failing to support the program are called and reminded that they should turn out.

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<sup>249</sup>MISSISSIPPI A & I BOARD, ALTITUDE IN ACTION 9, on file in University of Mississippi Law Library (BAWI-File No. 27).

<sup>250</sup>*Ibid.*

<sup>251</sup>*Ibid.*

In addition to the persuasive measures taken by the BAWI Action Committee under the instructions of the A & I Board, the bond issue is also subjected to advertising from the local industrial development groups. Pamphlets are handed out shortly before election containing a short history of the proposed company and containing some catch phrase such as "vote for progress."<sup>252</sup> In addition, the pamphlet contains certain guarantees or promises, which based upon history, it can ill afford to make. The pamphlet generally states that the community will lease the property to the industry and that the annual payments will be made in advance each year in a sufficient amount to retire the bonds. After the bonds are retired, and the community has a full return on its investment, in addition to the jobs created and the capital brought in, the community will retain the possession of the property and buildings. The pamphlet promises "this bond issue will not increase your taxes."<sup>253</sup>

The Local Action Committees, with the support of the A & I Board, its staff and the local newspapers, has proven very successful. With only negligible criticism, and that an occasional letter to the editor, the elections are generally an overwhelming success. It is indeed rare for a bond issue election to fail and when this does happen, it is due to a failure of a sufficient number of voters to turn out rather than negative votes.<sup>254</sup>

Such campaigns asserting the positive features of the A & I Board and the BAWI Program have resulted not only in a convincing of the voters of the merit of the program, but it has also tended to convince certain industry seekers that there are no faults in the program. Mr. Don Newton, Director of the Delta Industrial Council, Stoneville, Mississippi, said that he felt that the voters should not be given the full picture, but that they should be given only the positive side of the program. Indeed, he feels there are no negative features in the program.<sup>255</sup> When asked how he could justify that statement with instances in which companies coming in under BAWI financing folded, he said, "Even this is good for a community. Had the company not located there, there would not

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<sup>252</sup>Five examples on file in University of Mississippi Law Library (BAWI-File No. 27).

<sup>253</sup>*Contra*, Interview with Mr. Don Wylie, Chamber of Commerce Manager, Greenville, in Greenville, June 28, 1966; Confidential Interview with prominent Cleveland, Mississippi, merchant, June 27, 1966, text of interview on file in the University of Mississippi Law Library (BAWI-File No. 2).

<sup>254</sup>Futorian-Stratford, Inc., Tupelo, Contract No. 329, 1960; Super-Sagless Company, Tupelo, Contract No. 33, 1960 on file in A & I Board office, Jackson.

<sup>255</sup>Interview with Don A. Newton, Director of Industrial and Community Development Department of the Delta Council, in Stoneville, June 29, 1966.

have been a vacant building and without a vacant building some new company might not have been able to locate."<sup>256</sup>

A look at some statistics might better indicate the degree to which the voting public has been convinced of the merits of BAWI financing. In 1938 Jackson County Mills received \$150,000 from BAWI bonds from Pascagoula. The vote in that election was 514 to 9.<sup>257</sup> In 1939 the Natchez voters turned out to approve a \$300,000 bond issue by a vote of 2,408 to 68 for Armstrong Tire and Rubber Company.<sup>258</sup> In 1946 Corinth approved a \$25,000 issue for Barry Motors by a vote of 650 to 2.<sup>259</sup> Tylertown in 1947 provided \$135,000 in BAWI financing for Haspel Brothers with a vote of 336 to 11.<sup>260</sup> A \$160,000 issue was approved in 1949 by a vote of 724 to 17 in Purvis, Mississippi, for Movie Star.<sup>261</sup> Over the years the bond issues have become larger, and in 1951 Kosciusko approved \$650,000 in general obligation bonds in an election with 1435 voters approving and 18 dissenting,<sup>262</sup> and in the same year, Yazoo City approved \$750,000 for Mississippi Chemical Corporation in a vote of 3,843 to 16.<sup>263</sup> Meridian in 1951 floated a \$1,650,000 bond issue for Dickey Clay Manufacturers.<sup>264</sup> There were only 11 votes cast in opposition and 3,965 favoring the bond issue. In 1956 Corinth voted an election for Kellogg Switchboard and Supply Company. The voters by count of 3,511 to 15 approved the bond issue of \$1,250,000.<sup>265</sup> This contract was cancelled and then reissued in 1960. The vote in the 1960 election was 3,242 to 20.<sup>266</sup> This was surpassed in

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<sup>256</sup>*Ibid.*

<sup>257</sup>Grenada Industries, Inc., Grenada, Contract not numbered, 1938; Jackson County Mills, Pascagoula, 1938, Contract number not assigned, on file in A & I Board office, Jackson.

<sup>258</sup>Armstrong Tire and Rubber Company, Natchez, 1939, Contract number not assigned, on file in A & I Board office, Jackson.

<sup>259</sup>Berry Motors, Corinth, 1946, Contract number not assigned, on file in A & I Board office, Jackson.

<sup>260</sup>Haspel Bros., Tylertown, 1947, Contract Nos. 42 & 42A, on file in A & I Board office, Jackson.

<sup>261</sup>Movie Star of Mississippi, Purvis, 1949, Contract Nos. 52 & 52A, on file in A & I Board office, Jackson.

<sup>262</sup>Superior Coach Co., Kosciusko, 1951, Contract No. 86, on file in A & I Board office, Jackson.

<sup>263</sup>Mississippi Chemical Corp., Yazoo City, 1951, Contract No. 71, on file in A & I Board office, Jackson.

<sup>264</sup>Dickey Clay Mfg. Co., Meridian, 1951, Contract No. 116, on file in A & I Board office, Jackson.

<sup>265</sup>Kellogg Switchboard & Supply Co., Corinth, 1956, Contract No. 205, on file in A & I Board office, Jackson.

<sup>266</sup>Kellogg Switchboard & Supply Co., Corinth, 1960, Contract No. 324, on file in A & I Board office, Jackson.

1960 by a \$2,500,000 bond issue in Greenville, Mississippi, for the benefit of Borg-Warner Corporation.<sup>267</sup> In that election there were 4,596 approving the bond and 32 against. In a 1949 contract between Mid-South Manufacturing Company and Richton, Mississippi, the vote was 732 for and 18 against the \$150,000 issue.<sup>268</sup> This is of particular interest in that the company was in financial difficulty at the time the contract was made.<sup>269</sup> This can be noted in the sale of the bonds at between ½ and 1% higher interest than the bonds sold under BAWI contracts in the year previous and the year immediately after.<sup>270</sup> Of course, Richton's size might account for a portion of this difference. The Delta Architectural Products Company contract received a 1,728 to 15 approval by the voters of Cleveland.<sup>271</sup> The plant was under-financed from the beginning and quickly folded leaving Cleveland to bear a loss of over \$200,000.<sup>272</sup>

It is certainly no condemnation of the program that it receives overwhelming popular support. Still, the law provides for elections before a city puts its taxing power behind the credit of an individual. The act expresses a feeling that some benefit is derived by the voters affected exercising independent judgment in that it provides for elections. Without the facts at the electorate's disposal this is impossible.

Not all BAWI issues are all that attractive.<sup>273</sup> Yet, when city leaders were asked if they ever encounter opposition, the almost invariable answer was, "There are always a few crackpots!"<sup>274</sup> Mr. Paul Burt, Assistant Director of the A & I Board, was asked about opposition to the program. He said, "Very little." When asked the dispositions of

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<sup>267</sup>Borg-Warner Corp., Greenville, 1960, Contract No. 339, on file in A & I Board office, Jackson.

<sup>268</sup>Mid-South Mfg. Co., Richton, 1949, Contract No. 63, on file in A & I Board office, Jackson.

<sup>269</sup>Interview with Hon. Ben M. Stevens, Sr., Mayor of Richton, Mississippi, in Richton, July 20, 1966.

<sup>270</sup>MISSISSIPPI A & I BOARD, SUMMARY OF MISSISSIPPI BAWI PLANTS 1936-March 1966, 3-6, on file in University of Mississippi Law Library (BAWI-File No. 27).

<sup>271</sup>Delta Architectural Products, Cleveland, 1959, Contract No. 304, on file in A & I Board office, Jackson.

<sup>272</sup>Interview with Mr. Don Wylie, Chamber of Commerce Manager, Greenville, in Greenville, June 28, 1966; Confidential Interview with prominent Cleveland, Mississippi, merchant, June 27, 1966, text of interview on file with University of Mississippi Law Library (BAWI-File No. 2).

<sup>273</sup>See Mid-South Mfg. Co., Richton, 1949, Contract No. 63, on file with A & I Board, Jackson.

<sup>274</sup>Interviews with Mr. Paul Burt, Assistant Director of the Mississippi A & I Board, in Jackson, June 20, 1966; Mr. Albert Lake, Greenville Attorney, in Greenville, June 29, 1966.

complaining letters, he stated, "We put them in our 'nut' file."<sup>275</sup> The "nut" file, it appears, has been destroyed.<sup>276</sup> Certain letters that should apparently fall into the "nut" category have escaped this fate. Contract files, selected at random, contained such letters. The author or subject matter effected significantly enough the disposition of the contract that these letters were kept.

This is no blanket condemnation of the program. Some industrial prospects are so ideally suited to a community that no one could have a valid objection. Certainly some of the letter-writers and some of the voters who oppose bond issues do so for the sake of opposing. Still, there is an express legislative intent that the program be an elective one, and an outside possibility that some of the criticism received might prove constructive.

To correct the situation one of two courses would seem necessary. First, do away with the requirement for elections. If there is no need for a disclosure of all facts then the election is a sham—a waste of time and money. Second, publicize all the facts as to the company's financial condition, its past record, its wage scale, the comparison of that scale to a national and state scale, the cost of providing municipal services to the company, the effect of removing the property from the tax rolls, the effect that the new company might have on further industrialization and the effect that a failure of the company might have. Then, encourage the voicing of opinions both good and bad.

## VII. BAWI AND ORGANIZED LABOR

Union leaders have long contended that the BAWI program is operated in such a way as to avoid possibilities of unionization.<sup>277</sup> The unions charge the program with anti-union application even to the point of excluding high wage industry with union attachment.<sup>278</sup> Their contention is that community officials and local merchants and businessmen join with the community's industrialists to fight unionization in existing plants.<sup>279</sup> This effort, it is charged, extends to screening industries for their propensity for unionization and excluding the *dangerous ones*.<sup>280</sup> Field research indicates that each of these charges is well founded.

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<sup>275</sup>Interview with Mr. Paul Burt, Assistant Director of the Mississippi A & I Board, in Jackson, June 20, 1966.

<sup>276</sup>*Ibid.*

<sup>277</sup>Interview with Mr. Claude Ramsey, President of the Mississippi AFL-CIO in Jackson, June 21, 1966; address by Mr. Ramsey, N.D.E.A. Institute, University of Mississippi, July 13, 1966.

<sup>278</sup>*Ibid.*

<sup>279</sup>*Ibid.*

<sup>280</sup>*Ibid.*

Mississippi has and does sell cheap, passive labor.<sup>281</sup> Many of those responsible for securing industry for their area feel that this is the strongest selling point.<sup>282</sup> The facts seem to bear this out.<sup>283</sup> The availability and attitude of workers, and the prevailing wage rates consistently are among the most significant reasons given for locating a plant in Mississippi.<sup>284</sup>

To keep an area competitive, many industrial development leaders feel, requires keeping an area union-free. Mr. Frank Oakes, Director of the Southwest Mississippi Development District, is in agreement with this. He stated he would fight organized labor with every legal means at his disposal unless and until he felt he was damaging his area.<sup>285</sup> Mr. Griffin Norquist suggested one effective means of fighting union organization. In Yazoo City the merchants and industrialists are well organized. If a plant election is scheduled, the relatives of plant employees are advised that their jobs might well depend upon the outcome of the election.<sup>286</sup> The employee himself can be reached through outstanding loans and manipulation of his credit position. Mr. Norquist related, as an example of the effectiveness of this process, the events subsequent to the *Brown v. Board of Education*<sup>287</sup> decision of 1954. A number of Negro parents, relying on the *Brown* decision, attempted to enroll their children in white schools. A list of these people was circulated; and it was published in the local newspaper. Every person on the list moved out of Yazoo County.<sup>288</sup> Mr. Norquist suggested that this process is as effective in handling unions if done more discreetly.

Management's fear of labor problems permeates every part of the industrial location question. Generally these fears are allayed by *gentlemen's agreements*. These are agreements for protection from labor problems or labor shortages. The agreement can be as innocuous as a

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<sup>281</sup>MISSISSIPPI POWER AND LIGHT COMPANY, INDUSTRIAL FACTS 12 (1964 ed.); MISSISSIPPI POWER AND LIGHT COMPANY, INDUSTRIAL FACTS 22 (1966 ed.).

<sup>282</sup>MISSISSIPPI ECONOMIC COUNCIL, CONFIDENTIAL SURVEY ON INDUSTRIAL LOCATION FACTORS 7, on file in University of Mississippi Law Library (BAWI-File No. 29).

<sup>283</sup>*Ibid.*

<sup>284</sup>*Id.* at 6-8, 10, 15.

<sup>285</sup>Interview with Mr. Frank Oakes, Executive Director of the Southwest Mississippi Development District, in McComb, July 13, 1966.

<sup>286</sup>Interview with Mr. Griffin Norquist, County Attorney, Yazoo County, Mississippi, in Yazoo City, July 1, 1966.

<sup>287</sup>347 U.S. 483 (1954).

<sup>288</sup>Interview with Mr. Griffin Norquist, County Attorney, Yazoo County, Mississippi, in Yazoo City, July 1, 1966.

promise not to seek additional industry using the same type labor until enough labor of that type exists to assure both companies an adequate supply.<sup>289</sup> The agreement can also be so encompassing that it promises to bring no industry of a certain type in for a specified period of years, and promises assistance of the town officials and businessmen in beating down union problems.<sup>290</sup> Such agreements seem to be universal throughout the state.

Many industrialists are unwilling to rely on such agreements. They demand, and get, clauses in the BAWI lease agreement giving them the right to screen any future BAWI issues for a period of years.<sup>291</sup> Mr. Paul Burt, Assistant Director of the A & I Board, stated that the Board's present policy is to avoid such clauses unless the company is in a strong bargaining position and insists.<sup>292</sup> He contends that the use of such clauses has greatly decreased. The contents of file No. 451<sup>293</sup> (the first considered and chosen at random) supported the latter statement. Clause thirteen of the lease agreement gives certain screening rights. Several inter-departmental memos suggest removing the clause. Obviously the company insisted for the clause remained. The value of such a clause to the industrialists can be assumed by his willingness to insist upon it in face of Board opposition.

Baxter Laboratories of Cleveland insisted upon such a clause. This company was successful, through use of the clause and personal persuasion, in keeping Cleveland closed to other industry. Its success was so complete that it forced the citizens of Cleveland to form a committee to plead with the company for permission to locate another industry in Cleveland.<sup>294</sup>

The fear of organized labor is sufficient to close many areas of the state to any industry with a union contract or with a propensity to

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<sup>289</sup>Interview with Mr. Floyd Sperry, Executive Director of the Columbus-Lowndes Industrial Foundation, Inc., in Columbus, July 22, 1966.

<sup>290</sup>Interview with Mr. Griffin Norquist, County Attorney, Yazoo County, Mississippi, in Yazoo City, July 1, 1966.

<sup>291</sup>Baxter Laboratories, Inc., Cleveland, Contract No. 75 cl. m, 1950; Hamilton Mfg. Co., Attala County, Contract No. 451, sec. 13, 1964; Rice Stix Co., Water Valley, Contract No. 11 & 11A, 1945; Superior Coach Co., Kosciusko, Contract No. 86, 1951, on file in A & I Board office, Jackson.

<sup>292</sup>Interview with Mr. Paul Burt, Assistant Director of the Mississippi A & I Board, in Jackson, June 20, 1966.

<sup>293</sup>Hamilton Mfg. Co., Attala County, Contract No. 451, cl. 13, 1964, on file in A & I Board office, Jackson.

<sup>294</sup>Confidential Interview with prominent Cleveland, Mississippi, merchant, June 27, 1966, text of interview on file in the University of Mississippi Law Library (BAWI-File No. 2).

unionize. Many chamber of commerce managers and industrial foundation directors freely admit that their area will not accept such an industry.<sup>295</sup> This refusal to accept union plants has extended to situations in which the town was at the time faced with an empty building financed with BAWI funds.<sup>296</sup> Cleveland, Mississippi, had a building vacated by the bankruptcy of Delta Architectural Products, Inc. The citizens of Beat Four were paying the bonded indebtedness. The city ultimately lost \$140,000.<sup>297</sup> Kaiser Aluminum Company offered to take over the building. Kaiser had a *sweetheart* contract with the union, and for this reason their offer was refused.<sup>298</sup>

There is, or has been, a basis in fact for this fear of unionization. Mississippi has traditionally attracted *labor-oriented* industry,<sup>299</sup> and this type of industry is most fearful of unionization. It is based on low capital investment and requires a large number of unskilled or semi-skilled low wage employees. If labor costs rise there must be greater investment in production machinery in order to raise average production. This may be technologically impossible. If an area wishes to remain in competition for this type industry, it must offer some assurance of low wage stability.

The ability of an area to make such an offer is rapidly coming to an end. In a recent survey conducted by the Mississippi Economic Council it was found that labor shortage was a critical factor. The unemployment rate for Mississippi in 1965 was almost that of the nation.<sup>300</sup> The study stressed that Mississippi must put more emphasis on supplying skilled workers.<sup>301</sup> This would be a move in the direction of resolving the state's underemployment problems.

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<sup>295</sup>Mr. William B. Barrett, Executive Director of the North Mississippi Industrial Development Association: "Some towns in this district would still reject a union plant;" Mr. Harry Martin, Director of the Tupelo Community Development Foundation: "We would reject a union plant unless it was top quality;" Mr. Don A. Newton, Director of the Industrial and Community Development Department of the Delta Council: "I wouldn't want a union plant to come into any of the non-union towns in my area;" Mr. Bob Wheller, Chamber of Commerce Manager, Yazoo City: "I would discourage the city's considering a union plant of any kind."

<sup>296</sup>Interviews with Mr. Don Wylie, Chamber of Commerce Manager, Greenville, in Greenville, June 28, 1966; Mr. Harry Martin, Director of the Tupelo Community Development Foundation, in Tupelo, Aug. 11, 1966.

<sup>297</sup>Interview with Mr. Don Wylie, Chamber of Commerce Manager, Greenville, in Greenville, June 28, 1966.

<sup>298</sup>*Ibid.*

<sup>299</sup>MISSISSIPPI ECONOMIC COUNCIL, CONFIDENTIAL SURVEY ON INDUSTRIAL LOCATION FACTORS 4 (1965 ed.), on file in University of Mississippi Law Library (BAWI-File No. 29).

<sup>300</sup>*Id.* at 10-11.

<sup>301</sup>*Id.* at 11.

The solution is not an easy one and surely unionization also brings problems. One example is Masonite Corporation of Laurel, Mississippi. Nearby cities that would otherwise have no objection to locating unionized plants fear problems similar to those of Laurel.<sup>302</sup> It is difficult to assess the cause of Masonite's labor-management disputes, but its effect on the entire area is realized. Industries, whether unionized or not, are reluctant to locate either in Laurel or nearby communities because of a belief that the Masonite problem will spread.<sup>303</sup> Labor-management problems like those in Laurel adversely affect the workings of industrial foundations and chambers of commerce, and they are difficult to overcome. A method used by the city of Hattiesburg, which is but thirty miles from Laurel, is by testimonials. By obtaining letters from personnel managers of industrial concerns in the Hattiesburg area stating the absence of union troubles and the good labor-management working relationship,<sup>304</sup> the bad effect of nearby labor difficulties is offset.<sup>305</sup>

It is submitted that Mississippi's approach is outdated. What is needed is an assessment and a re-evaluation of the state's goals. The assessment has already been conducted.<sup>306</sup> Industrialists were asked the following questions: (1) What factors favorably influenced your location in the state?<sup>307</sup> (2) What factors favorably influenced expansion of your plant after location?<sup>308</sup> (3) What factors were unfavorable to your location in the state?<sup>309</sup> (4) What factors were unfavorable to your expanding the plant in the state?<sup>310</sup> The most prevalent answers centered around the labor problem and were often paradoxical. It was asserted that lack of unions served to attract industry, while lack of skilled workers retarded economic growth and industrial location. The survey

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<sup>302</sup>Interview with Mr. Henry W. Pyne, President of the Hattiesburg Chamber of Commerce, in Hattiesburg, July 15, 1966.

<sup>303</sup>Interview with Mr. Thomas P. Palmer, Executive Vice-President of Meridian Industrial and Commercial Foundation, in Meridian, July 21, 1966.

<sup>304</sup>Letters from Mr. W. J. Joyner, Personnel Supervisor, Hercules Powder Company, Hattiesburg, to Mr. Henry W. Pyne, Chamber of Commerce Manager Hattiesburg, April 9, 1964; Mr. Gordon L. Macaulay, Treasurer, Reliance Manufacturing Service Corporation, Hattiesburg, to Mr. Henry W. Pyne, Chamber of Commerce Manager, Hattiesburg, April 9, 1964.

<sup>305</sup>Interview with Mr. Henry W. Pyne, Chamber of Commerce Manager, Hattiesburg, in Hattiesburg, July 15, 1966.

<sup>306</sup>MISSISSIPPI ECONOMIC COUNCIL, CONFIDENTIAL SURVEY ON INDUSTRIAL LOCATION FACTORS 10-11 (1965), copy on file in University of Mississippi Law Library (BAWI-File No. 29).

<sup>307</sup>*Id.* at 10-12, 20, 24, 28, 32, 36.

<sup>308</sup>*Id.* at 15, 22, 26, 30, 34, 38.

<sup>309</sup>*Id.* at 13-14, 21, 25, 29, 33, 37, 40.

<sup>310</sup>*Id.* at 16-17, 23, 27, 31, 35, 39.

also pointed out that Mississippi's labor reserve had practically been exhausted and that emphasis needed to be placed on "high productivity industries."<sup>311</sup> It is submitted that the time has come for Mississippi to cease its rear-guard action against unions and to begin creating an atmosphere in which government, labor, and management can form a workable partnership from which all the state's citizens can benefit.

#### VIII. BAWI—RACIAL IMPLICATIONS

Of primary consideration in a discussion of the BAWI program is its effect on the Negro community and the Negro community's effect on the program. The areas of the state covered by field research revealed almost none still "hungry" for industry.<sup>312</sup> While not faced with over-all chronic unemployment, many areas did admit a surplusage of Negro labor.<sup>313</sup> This situation suggests numerous pertinent questions: (1) Is the state using BAWI to provide jobs for its Negro citizens? (2) Does it have an obligation to do so? (3) What effect does Mississippi's racial "image" have on her efforts to attract industry?

##### *(1) Is BAWI Providing Jobs for the Negro Worker?*

The answer is, not to any significant degree.<sup>314</sup> The reasons for this go beyond a present desire to exclude Negro workers, though such a desire presently exists.<sup>315</sup> The lack of educational and economic opportunities of the past has greatly contributed to the problem. Many types of jobs are closed to significant numbers of Negro applicants because they fail to meet the educational requirements.<sup>316</sup>

Whatever the cause, a marked reluctance to provide jobs for Negroes is demonstrable. Yazoo City and McComb offer an example.<sup>317</sup>

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<sup>311</sup>*Id.* at 2.

<sup>312</sup>Interviews with Hon. Ben M. Stevens, Sr., Mayor of Richton, Mississippi, in Richton, July 20, 1966; Mr. Floyd Sperry, Executive Director of the Columbus-Lowndes Industrial Foundation, Inc., in Columbus, July 22, 1966.

<sup>313</sup>Interviews with Mr. Frank Oakes, Executive Director of the Southwest Mississippi Development District, in McComb, July 13, 1966; Mr. Bob Wheller, Chamber of Commerce Manager, Yazoo City, in Yazoo City, June 30, 1966.

<sup>314</sup>Interviews with Mr. Oliver Emerich, Editor, The McComb Enterprise-Journal, in McComb, July 13, 1966; Mr. Hodding Carter, III, Editor, The Delta Democrat-Times, Greenville, in Greenville, June 28, 1966.

<sup>315</sup>Interview with Mr. Griffin Norquist, County Attorney, Yazoo County, Mississippi, in Yazoo City, July 1, 1966.

<sup>316</sup>Interview with Mr. Oliver Emerich, Editor, The McComb Enterprise-Journal, in McComb, July 13, 1966.

<sup>317</sup>Interviews with Mr. Bob Wheller, Chamber of Commerce Manager, Yazoo City, in Yazoo City, June 30, 1966; Mr. Griffin Norquist, County Attorney, Yazoo County, Mississippi, in Yazoo City, July 1, 1966; Mr. Oliver Emerich, Editor, The McComb Enterprise-Journal, in McComb, July 13, 1966.

These cities have taken positive steps to exclude Negroes. Mr. Griffin Norquist, City Attorney for Yazoo City and a member of the county's Industrial Development Board, candidly admitted that Yazoo County was not seeking employment opportunities for Negroes.<sup>318</sup> Mr. Norquist feels that Yazoo County is faced with the political reality of potential Negro control. Yazoo County has approximately 18,000 Negro citizens and 13,000 white citizens.<sup>319</sup> He feels that an assumption of political power by the Negroes of the county would be disastrous. He sees as a means of combating this, promotion of Negro emigration from the county.<sup>320</sup>

Mr. Norquist's views are contradicted by Mr. Robert Wheller, Manager of the Yazoo City Chamber of Commerce. Mr. Wheller feels that the county is making every effort to secure jobs for its Negro citizens.<sup>321</sup> He contends that the Equal Opportunity Employment Act<sup>322</sup> will work well in Yazoo City. Mr. Wheller contends that many jobs in the city are staffed by Negro and white working in harmony.<sup>323</sup>

Mr. Oliver Emmirich, Editor of the McComb Enterprise Journal, once found the McComb Chamber of Commerce opposed to his plan to acquire a garment factory to be staffed by Negro women.<sup>324</sup> He relates an instance when machines were placed in the Negro high school to train students for certain jobs. Local white citizens complained of discrimination. Similar machines were placed in the white high school. It then occurred to someone that Negroes and whites were being trained for the same jobs. This would not do, so the matter was resolved by removing the machines from both schools.<sup>325</sup> This wise and eminently fair decision had the effect of depriving students of opportunity without regard to race, creed or color! Mr. Emmerich diligently promoted McComb as a site for a proposed Veterans Administration Hospital. He felt certain that McComb had been chosen. A majority of this hospital's patients would be Negro. Certain citizens of McComb opposed

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<sup>318</sup>Interview with Mr. Griffin Norquist, County Attorney, Yazoo County, Mississippi, in Yazoo City, July 1, 1966.

<sup>319</sup>Interview with Mr. Bob Wheller, Chamber of Commerce Manager, Yazoo City, in Yazoo City, June 30, 1966.

<sup>320</sup>Interview with Mr. Griffin Norquist, County Attorney, Yazoo County, Mississippi, in Yazoo City, July 1, 1966.

<sup>321</sup>Interview with Mr. Bob Wheller, Chamber of Commerce Manager, Yazoo City, in Yazoo City, June 30, 1966.

<sup>322</sup>78 Stat. 253 (1964), 42 U.S.C. § 2000e (1964).

<sup>323</sup>Interview with Mr. Bob Wheller, Chamber of Commerce Manager, Yazoo City, in Yazoo City, June 30, 1966.

<sup>324</sup>Interview with Mr. Oliver Emerich, Editor, McComb Enterprise-Journal, in McComb, July 13, 1966.

<sup>325</sup>*Ibid.*

the placing of such a hospital in the area. They were successful and many excellent job opportunities were lost.<sup>326</sup>

Mr. Floyd Sperry, Manager of the Columbus-Lowndes County Industrial Foundation is actively seeking to change this picture and provide jobs for the forty percent Negro population of Lowndes County.<sup>327</sup> Mr. Frank Oakes, Executive Director of Southwest Mississippi Development District, McComb, is also seeking jobs for colored employees. His area's present need is jobs for colored women.<sup>328</sup> These and other efforts to raise the standard of living for Mississippi's colored citizens are comforting.

In most areas of the state it is impossible to determine categorically that the BAWI is intentionally used to deprive Negro workers of job opportunities. On the other hand, it is equally difficult to find an instance where a benefit accruing to the Negro worker is anything but incidental to the plant placement.

## (2) *The State's Obligation to Provide Jobs for All Its Citizens*

There is little use in arguing the state's moral obligation. The state legislature attempted to enact a program that would benefit all the state's citizens.

As a matter of economic reality any attempt at limiting the program's efforts to secure jobs for Caucasians is harmful to both races. If Mississippi is to realize a goal of seventy-five percent of the national per capita income average by 1975, it must provide means of advancing the income of the Negro.

The more serious question is whether Mississippi has a legal obligation to provide jobs for Negroes under the BAWI scheme. There presently appears to be no concerted action to determine the question. One case is being considered and is likely to be filed if the facts warrant such action.<sup>329</sup> Further, the Negro community does not give priority to attainment of equal status within the BAWI plan. At a recent National

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<sup>326</sup>*Ibid.*

<sup>327</sup>Interview with Mr. Floyd Sperry, Executive Director of the Columbus-Lowndes Industrial Foundation, Inc., in Columbus, July 22, 1966.

<sup>328</sup>Interview with Mr. Frank Oakes, Executive Director of the Southwest Mississippi Development District, in McComb, July 13, 1966.

<sup>329</sup>Mr. Dixon Pyle of Jackson has drawn a complaint under 42 U.S.C. §§ 1983-86 in which he alleges a conspiracy by the Mississippi A & I Board, the City of Philadelphia, Mississippi, the County of Neshoba, the city's Mayor and Board of Aldermen and Emerson Electric Co. against the International Union of Electrical, Radio and Machine Workers, C.I.O., et ux. This action charges violation of the civil rights of the union members. Telephone interview with Mr. Dixon Pyle, June 16, 1967.

Association for the Advancement of Colored People convention the number one goal set was for equal employment. The view of the Negro in Mississippi might well have been expressed when Dr. Aaron Henry stated that his organization supported the BAWI program because it provided jobs. He said that jobs must first exist before one can fight over who is to get them. If there are no jobs the question of equal employment opportunities is moot.<sup>330</sup>

Dr. Henry took a unique view of the Negro's role in the black-white power struggle. He said the BAWI industries hold the Negro as a club over the heads of poor white Mississippians; if the white worker threatens to unionize, the industrialist counters by threatening to replace him with Negro labor. In this manner cheap white labor is perpetuated.<sup>331</sup> However, in the same manner, Negro unemployment is also perpetuated.

The Mississippi courts have not yet decided whether BAWI plants are legally obligated to employ Negroes. There is no "equal protection" clause as such in the state's constitution. There is a state constitutional "due process" clause<sup>332</sup> into which there seems to have been read an implied "equal protection" clause.<sup>333</sup> Some would argue that with the passage of recent civil rights legislation including equal employment opportunities provisions the question is moot. That is a misconception in that remedies are more rapidly attained when one asserts that he is being deprived of a Constitutional right than where he asserts a merely statutory violation. The lack of opinions in this area makes prognostication difficult. It is submitted that the Mississippi courts would require the complainant to specifically show that he had been denied employment because of his race for section fourteen to apply.

The federal Constitutional issue is less difficult. The Supreme Court has held that a private lessee whose premises are owned by the public must not refuse service based on race.<sup>334</sup> It later held in a case arising in Mississippi that property privately owned, but constructed and improved with state and federal funds, was public property under the fourteenth amendment.<sup>335</sup> Even though the plants financed under the BAWI program are publicly owned,<sup>336</sup> this does not appear to be a requisite for fourteenth amendment under *Mason v. City of Biloxi*.<sup>337</sup>

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<sup>330</sup>Interview with Dr. Aaron Henry, State President of Mississippi N.A.A.C.P., in Clarksdale, Nov. 22, 1966.

<sup>331</sup>*Ibid.*

<sup>332</sup>Miss. CONST. art. III, § 14.

<sup>333</sup>*Ballard v. Mississippi Cotton Oil Co.*, 81 Miss. 507, 34 So. 533 (1903).

<sup>334</sup>*Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

<sup>335</sup>*Mason v. City of Biloxi*, 385 U.S. 370 (1966).

<sup>336</sup>Miss. CODE ANN. § 8936-21 (1956).

<sup>337</sup>*Mason v. City of Biloxi*, 385 U.S. 370 (1966).

The question is whether the project is a private or a public one. The statute specifically declares it to be public property.<sup>338</sup> Further, the public policy justification for the program demands that it serve *all* Mississippians.<sup>339</sup> If the BAWI program serves no public need, then it is invalid under the Mississippi Constitution.<sup>340</sup> However, the validity of BAWI has already been affirmed even though not in the context of the "equal protection" clause of the United States Constitution.<sup>341</sup> Another justification for adjudging BAWI plants public property is the tax exempt benefits which they receive.<sup>342</sup> It is submitted that if the Mississippi courts do not soon declare the equal employment rights of Negroes to work in BAWI plants, the federal courts will do so.

### (3) *The State's Race Image*

Most of the men interviewed felt that the state's "image" was no handicap to industrial advancement.<sup>343</sup> Many felt that any adverse effect was limited to the period immediately following the James Meredith affair.<sup>344</sup>

Mr. Al Johnson, Pascagoula Port Director, feels that some industrialists shun Mississippi because of problems inherent in obtaining separate facilities for employees.<sup>345</sup> Mr. Floyd Sperry at Columbus feels that the state's image has had a definite adverse effect on Mississippi's ability to attract industry. Replies to his efforts have varied from a refusal to give Mississippi even the remotest consideration to expressed concern over possible racial boycotts.<sup>346</sup> Mr. Sperry does feel that any adverse effect of image is wanting.

Those who contend that the state's racial image has had no adverse effects are supported by the continuing market for the state's bonds. Mr. Carl Traunicht, St. Louis Bond Attorney, states that there has been no decrease in the marketability of these bonds.<sup>347</sup>

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<sup>338</sup>MISS. CODE ANN. § 8936-21 (1956).

<sup>339</sup>MISS. CODE ANN. § 8936-05 (Supp. 1966).

<sup>340</sup>MISS. CONST. art. XIV, § 258.

<sup>341</sup>Albritton v. City of Winona, 181 Miss. 75, 111, 178 So. 799, 809 (1938).

<sup>342</sup>Cf. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

<sup>343</sup>Interview with Mr. W. D. Bailey, Executive Vice-President of the Pascagoula Chamber of Commerce, in Pascagoula, July 18, 1966.

<sup>344</sup>Interview with Mr. Paul Burt, Assistant Director of the Mississippi A & I Board, in Jackson, June 20, 1966.

<sup>345</sup>Interview with Mr. Albert S. Johnson, Director of the Jackson County Port Authority, in Pascagoula, July 18, 1966.

<sup>346</sup>Interview with Mr. Floyd Sperry, Executive Director of the Columbus-Lowndes Industrial Foundation, Inc., in Columbus, July 22, 1966.

<sup>347</sup>Interview with Mr. Carl Traunicht, of Charles and Traunicht, Attorneys, St. Louis, Missouri, in St. Louis, Aug. 4, 1966.

Those who feel that image is still a problem are supported by a study published by the Industrial Survey Committee of the Mississippi Economic Council.<sup>348</sup> This study shows that, of plants that considered Mississippi but decided to locate elsewhere, the most prevalent cause was racial strife.<sup>349</sup> Those industries that located in Mississippi ranked the state's image third among discouraging factors.<sup>350</sup> Quality of labor received thirty-eight points, lack of community facilities received thirty-four points, and the state's image thirty-three points. Image was divided into lack of information (eighteen points) and racial turmoil (fifteen points).<sup>351</sup>

There is, accepting the above study as reasonably correct, pressing need to improve the state's image. The Mississippi Economic Council anticipated the results of this study and began its efforts to improve the state image by a statement calling for respect for law and order.<sup>352</sup>

Mississippi is making great progress in solving its racial problems. The growing attempts to provide decent employment for all her citizens is evidence of this.<sup>353</sup> The state needs to continue this progress and advertise her advances.

#### IX. COMPARATIVE PLANS

The nation's first formal industrial inducement program was initiated by Mississippi in 1936.<sup>354</sup> Since that time many states have adopted similar programs.<sup>355</sup> Louisiana has approved such a plan, but with some apparent improvements. Mr. William T. Hackett, director of Louisiana's Department of Commerce and Industry,<sup>356</sup> and former member of Mississippi's A & I Board, said that the Louisiana system for attracting industry was superior in several respects. He said the fact that Board members are appointed on a staggered term basis,<sup>357</sup> rather

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<sup>348</sup>MISSISSIPPI ECONOMIC COUNCIL, CONFIDENTIAL SURVEY ON INDUSTRIAL LOCATION FACTORS (1965), copy on file in University of Mississippi Law Library (BAWI-File No. 29).

<sup>349</sup>*Id.* at 40.

<sup>350</sup>*Id.* at 21.

<sup>351</sup>*Id.* at 20-21.

<sup>352</sup>*Id.* at 18.

<sup>353</sup>Interviews with Mr. Floyd Sperry, Executive Director of the Columbus-Lowndes Industrial Foundation, Inc., in Columbus, July 22, 1966; Mr. Frank Oakes, Executive Director of the Southwest Mississippi Development District, in McComb, July 13, 1966.

<sup>354</sup>Miss. Laws 1st Ex. Sess. 1936, ch. 1.

<sup>355</sup>*E.g.*, LA. REV. STAT. ANN. § 921 (1965).

<sup>356</sup>*Ibid.*

<sup>357</sup>LA. REV. STAT. ANN. § 924 (1965).

than all being appointed by one governor, added stability, continuity, and security to the organization. Since the Board appoints its own director,<sup>358</sup> the chance of obtaining a qualified man is greater than in Mississippi where the appointment is made by the governor.<sup>359</sup> The Louisiana Board is composed not of politicians as in Mississippi, but of businessmen interested in doing a professional job. In Mississippi Board members out of necessity are primarily concerned with perpetuating themselves in office, or with making arrangements for new and better positions after they are asked to resign by the new administration.<sup>360</sup>

Though Louisiana has improved on Mississippi's program in some respects, Mr. Hackett believed that Mississippi still excels in some areas of its program. While the strong centralized government that exists in Louisiana is an asset in some respects, it is in others a serious drawback. Mr. Hackett stated that Louisiana does not have the strong local government that exists in Mississippi. There is no competition among local industrial inducement programs, and therefore no incentive. Much of the work in Mississippi is conducted by individuals on the local level who are most interested in the success of the program and who are best able to convince a particular industry it should move into that area.<sup>361</sup> It may be argued that the majority of industries that move into Mississippi do so as a result of this local effort.<sup>362</sup>

Hackett is presently attempting to introduce a regional inducement program. To some degree this will be patterned after the one in Mississippi. In Mississippi the area inducement organizations and foundation development boards are fairly independent, only secondarily controlled by the local towns and counties, and only remotely controlled by the state agency.<sup>363</sup> In Louisiana the area groups will be

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<sup>358</sup>LA. REV. STAT. ANN. § 926 (1965).

<sup>359</sup>MISS. CODE ANN. § 8936 (Supp. 1966). Interview with Mr. William T. Hackett, Jr., Executive Director of the Louisiana Department of Commerce and Industry, in Baton Rouge, Louisiana, July 11, 1966.

<sup>360</sup>Interview with Mr. William T. Hackett, Jr., Executive Director of the Louisiana Department of Commerce and Industry, in Baton Rouge, Louisiana, July 11, 1966.

<sup>361</sup>Interviews with Mr. Paul Burt, Mississippi A & I Board Assistant Director, in Jackson, Mississippi, June 20, 1966; Mr. Henry Maddox, Executive Director of the Missouri Department of Commerce and Industry, in Jefferson City, Missouri, Aug. 5, 1966.

<sup>362</sup>Interview with Mr. William B. Barrett, Executive Director of the North Mississippi Industrial Development Association, in West Point, Mississippi, Aug. 10, 1966.

<sup>363</sup>Because of state financial resources A & I Board advertising is more extensive than that of the local area groups. Further, some industrial contacts come through the A & I Board.

created through the work of Mr. Hackett and the Department of Commerce and Industry, and will be responsible to him. The purpose of the groups will be to initiate organized enthusiasm on the local level.<sup>364</sup>

Louisiana has an organization similar to the Mississippi Industrial Development Corporation known as IDEA, Industrial Development Education Association, which is composed entirely of businessmen and which works as an advisory group for the Department of Commerce and Industry.<sup>365</sup> The purpose of such a group is twofold. It contributes new thoughts on obtaining industry for the state, and it stimulates interests among those who are members of the association.

Many of the problems faced by Mississippi are present in other states. A major defect in the Louisiana program is industry's failure to inform the Department of its employment needs. Mr. Hackett contends that if the Department possessed this information it would provide the companies with skilled employees. Louisiana has a serious shortage of trained instrumentation workers who are absorbed by industry before they graduate from any training program.<sup>366</sup>

Mr. Henry Maddox, Director of the Missouri Department of Commerce and Industry and past Director of the Mississippi Agricultural and Industrial Board, contends that Missouri's system is more effective than Mississippi's.<sup>367</sup> His department is composed of a six-man bipartisan commission appointed on a staggered term basis.<sup>368</sup> This, to a large degree, removes the commission members from political pressure. Mr. Maddox said this was a much more practical approach, and it created a more effective organization. Political machinations existing in the Mississippi program result in about three years of a director's term being wasted. The director's term is but four years. The first year and a half are consumed getting adjusted; the last year and a half are spent looking for employment after the new governor comes into office. This leaves only one year of concentrated effort on the responsibilities for which the director is being paid. Under the Missouri ap-

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<sup>364</sup>Interview with Mr. William T. Hackett, Jr., Executive Director of the Louisiana Department of Commerce and Industry, in Baton Rouge, Louisiana, July 11, 1966.

<sup>365</sup>*Ibid.*

<sup>366</sup>*Ibid.* Some contend that a department of labor retards efforts to train skilled workers. Interview with Mr. Gene Wallace, Attorney for the Department of Commerce and Industry, in Baton Rouge, Louisiana, July 11, 1966.

<sup>367</sup>Interview with Mr. Henry Maddox, Executive Director of the Missouri Department of Commerce and Industry, in Jefferson City, Missouri, Aug. 5, 1966.

<sup>368</sup>MO. ANN. STAT. § 255.061(1)(2) (1960), the agency is actually titled the Division of Commerce and Industry and is within the Department of Business and Administration. MO. ANN. STAT. § 255.011 (1960).

proach a director retains his position as long as he is successfully doing the job for which he is being paid.<sup>369</sup>

The Missouri scheme is by no means perfect. Like Mississippi it lacks a strong vocational training program, and it is now caught with a shortage of technically skilled employees. Mr. Maddox's main complaint however, is the lack of local enthusiasm. He views a near perfect system as one with the legal framework of Missouri and the local enthusiasm of Mississippi.<sup>370</sup>

Despite many faults in the BAWI program, the A & I Board, and the local industrial inducement organizations, Mississippi's program serves one important function. It trains competent people to operate similar organizations in other states. Presently the agencies of three states, Texas, Missouri and Louisiana, are headed by individuals who were citizens of Mississippi and who received their training in Mississippi. All indications are that these men are serving their respective states well. At least two of these men indicate a regret at having to leave the state. Why, then, did they go? Political pressure, lack of job security, and lack of authority to operate their own department were contributing factors.<sup>371</sup> If Mississippi is to retain such talent and if the state is to receive the most from its efforts, a change must be made.

#### X. CONCLUSION: PROPOSED CHANGES

Problems in Mississippi's Balance Agriculture With Industry program are many. Some result from defects within the system; others from the approach taken by its personnel. There is a consensus that (1) the Agricultural and Industrial Board should be restructured so as to remove it from the whims of politicians, (2) more emphasis should be placed on locating heavy, high-wage industry, and (3) a stronger, more centralized vocational and technical training program should be adopted.<sup>372</sup> In addition it is the view of the writers of this article that the advertising philosophy should be changed, and the entire state

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<sup>369</sup>MO. ANN. STAT. § 255.071(1) (1959); Interview with Mr. Henry Maddox, Executive Director of the Missouri Department of Commerce and Industry, in Jefferson City, Missouri, Aug. 5, 1966.

<sup>370</sup>Interviews with Mr. Henry Maddox, Executive Director of the Missouri Department of Commerce and Industry, in Jefferson City, Missouri, Aug. 5, 1966; Mr. William T. Hackett, Jr., Executive Director of the Louisiana Department of Commerce and Industry, in Baton Rouge, Louisiana, July 11, 1966.

<sup>371</sup>*Ibid.*

<sup>372</sup>Interviews with Mr. William T. Hackett, Jr., Executive Director of the Louisiana Department of Commerce and Industry, in Baton Rouge, Louisiana, July 11, 1966; Mr. Henry Maddox, Executive Director of the Missouri Department of Commerce and Industry, in Jefferson City, Missouri, Aug. 5, 1966.

industrial inducement program should be modified to avoid duplication and waste of time and money.

Restructuring of the A & I Board is urgently needed. The following changes are suggested: (1) reduce the size of the Board to five members selected from the state at large; (2) remove the governor and all other state officers from positions on the Board; (3) have the five Board members appointed by the governor on a staggered term basis with their terms running for a period of ten years, and with one member's term expiring every two years; (4) permit the Board by a majority vote to select its directors; (5) allow the Board to fire a director by majority vote; (6) retain the director as an ex-officio member of the Board with no right to vote; (7) permit the director to hire and fire his own staff; (8) have the director's salary provided by the legislature in a specific sum; and (9) insert a provision in the Mississippi Constitution prohibiting a reduction in the director's salary during his term. As a partial guide for this modification the legislature might look to the language of the statute providing for the state educational finance commission.<sup>373</sup>

Presently there are thirty-five members of the A & I Board. This large number makes the organization ineffective. A group of five seems small enough to be effective, yet large enough to fulfill the aims of the program. With such a small Board an executive committee would be unnecessary. These members should continue to be appointed by the governor, for without the chief executive's interest and involvement the program cannot be a complete success. The governor's influence both with out-of-state industries and with the legislature on matters of appropriations is indispensable. However, too much gubernatorial intervention is bad. It tends to promote a rest home for tired politicians, rather than a workable state agency. It also encourages appeals for immediate voter sentiment rather than long range economic planning. For this reason the staggered term appointment of Board members is suggested. Under the plan proposed here no governor could control the Board or its director since the chief executive could appoint only two Board members during his term, barring death or resignation by other members.

The governor should stand ready to assist the Board and director whenever asked to do so. He should not interfere with matters which fall within the Board's discretion. To accomplish this the governor would not be allowed to hold a position on the Board.

Political influence by indirect methods should also be discouraged. To accomplish this the legislature should set the director's salary at a

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<sup>373</sup>MISS. CODE ANN. § 6246-03 (Supp. 1966).

specified annual sum, not to be reduced so long as that particular individual serves as director. This would necessitate a constitutional amendment similar to that provided for judges.<sup>374</sup> Without such a provision the governor could convince the legislature to dispose of the director by reducing his salary.

The director should be selected by the Board, not by the governor. Under the proposed plan the Board would be better qualified. Since no one governor would be able to appoint more than two members, his primary concern would be to obtain competent men in the field of industrial inducement. That being the case, the Board should be better able to determine who is, or is not, the best man for the job of director. Likewise, the Board should be able to dispose of a director who is not carrying out the purpose of the Act.

The director should be permitted to select his own staff. This would allow him to choose competent personnel with whom he would be better able to work. It would stop the practice of governors paying political debts with A & I Board staff positions. Finally, the Mississippi taxpayer would be receiving a *full day's work for a full day's pay!*

The suggested changes are needed for several reasons. In some areas there is mistrust. A few people engaged in industrial inducement on the local level stated they received little or no assistance from the A & I Board. The reason for this, they believed, was that their communities had not voted for the governor, and this was his way of reciprocating. Whether this mistrust is well founded is not known, but the mere fact that it exists is justification for change. This is especially true in light of the fact that the Mississippi industrial development program's prime asset is its incentive on the local level.

The state system should be altered in an effort to retain competent personnel to operate the A & I Board. At least three highly qualified individuals have left to become directors of other state agencies. More will continue to leave if not insulated from gubernatorial discretion. Mississippi cannot afford to lose its most qualified public servants.

The structural changes in the state A & I Board should be only a beginning. Efforts should be made to coordinate the work of city chambers of commerce, county industrial foundations, and multi-county industrial inducement organizations. The time and expense saved would justify a program of centralized planning. The amount of money saved on advertising alone might well merit such a change.

Another change should be in the direction of attracting high-wage, technically oriented industry. Agricultural and Industrial Board members contend that efforts are presently being made in that direction.

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<sup>374</sup>MISS. CONST. art. VI, § 166.

These efforts should be increased. With the exception of Negro women workers the unskilled Mississippi labor market has been almost completely absorbed by low wage industry. Mississippi will have increasing difficulty in supplying the one and a half workers per job required under its statute. There is no unemployment problem in Mississippi today. The problem is one of underemployment, *i.e.*, too many Mississippians working for too small a wage.

The way to solve underemployment is by attracting technically oriented industry. The way to attract such industry is by supplying a skilled labor force. No such labor force exists in Mississippi today. The state legislature attempted to end the shortage of technically trained employees by passing a vocational training act, and this was a step in the right direction, but more is needed. Greater incentive should be given industry to train its own employees. This might be accomplished through tax benefits, better loan programs, or by outright gift. In addition, a state supported centralized vocational training system needs to be encouraged. The logical agency to supervise such a program would be the A & I Board. It should be given the authority to control funds expended on job training, and it should be permitted to set broad guidelines as to the curricula in the state schools. The A & I Board's present role as advisor and statistics gatherer is insufficient.

Mississippi's advertising policy should be changed. Industry should not be encouraged to come into the state in order to make a profit at the expense of Mississippi citizens. While little can be done to prohibit private power companies from conducting such advertising campaigns, the state should not lend its resources for such purposes. With state emphasis shifting from low wage garment and textile manufacturing to high wage paper, rubber, and chemical manufacturing, advertising cheap labor should no longer be tolerated. It is submitted that the changes suggested here will do much toward Mississippi's meeting its goal of seventy-five percent of the national average wage by nineteen seventy-five.

## STUDENT COMMENTS

### MISSISSIPPI'S CAMPUS SPEAKER BAN: CONSTITUTIONAL CONSIDERATIONS AND THE ACADEMIC FREEDOM OF STUDENTS

[T]he First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.<sup>1</sup>

Learned Hand

With his customary felicity, the late Judge Hand has given us as apt an articulation of the first amendment's standard for free speech as is to be found. Puzzingly, Mississippi's state-supported institutions of higher learning have laid aside the standard esteemed by Judge Hand in favor of one that is more restrictive and authoritarian.<sup>2</sup> The purpose of this comment is to examine this newly imposed standard in the light of the first and fourteenth amendments of the United States Constitution, sections eleven and fourteen of the Mississippi Constitution and the emergent legal concept of the academic freedom of students.<sup>3</sup> To lay the necessary background of perspective against which this newly-imposed standard can be analyzed, it is essential first to review the more traditional legal instruments of control over publicly supported education: control over the faculty, the content of the curriculum, and the selection of textbooks.

#### I. CONTROL OVER THE FACULTY

In order to qualify for appointment to a position of academic rank (full professor, associate professor, assistant professor, instructor) at one of Mississippi's state-supported institutions of higher learning, the aspirant must hold an advanced degree in addition to his bachelor's degree.<sup>4</sup>

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<sup>1</sup>United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

<sup>2</sup>Resolution adopted by the Board of Trustees of State Institutions of Higher Learning, November 17, 1966, (Official Minutes Book, Office of the Executive Secretary of the Board of Trustees of State Institutions of Higher Learning, Jackson, Miss.)

<sup>3</sup>See Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 L. IN TRANS. Q. 1 (1965) and citations collected therein at 2 n.3.

<sup>4</sup>BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING, BY-LAWS AND POLICIES 18 (Jackson, Miss., 1964) (*semble*).

As a state employee, he is required, by statute, to declare that he neither advocates the violent overthrow of the government nor belongs to any organization which has such as one of its purposes.<sup>5</sup> In light of recent Supreme Court decisions in *Elfbrandt v. Russell*<sup>6</sup> and *Keyishian v. Board of Regents*<sup>7</sup> the Mississippi statute appears to be infested with unconstitutionally broad language. In *Keyishian* the Court held that mere knowing membership in such an organization without specific intent to further the unlawful aims of that organization was not a constitutionally adequate basis for exclusion from teaching in the public school system.<sup>8</sup>

Until this past summer professors in our state's publicly-supported colleges and universities were required by statute to file affidavits listing all organizations of which they had been members, or to which they had made regular contributions during the five years preceding.<sup>9</sup> On July 21, 1966, the United States District Court for the Northern District of Mississippi, having heard arguments on a petition for injunctive relief, noted that all issues in the cause were controlled by *Shelton v. Tucker*<sup>10</sup> and declared Mississippi's listing affidavit to be repugnant to the fourteenth amendment to the United States Constitution, and thus void and of no effect.<sup>11</sup>

The faculty and staff of publicly supported colleges and universities in this state are subject to a commonplace rule in the area of political activities.<sup>12</sup> "Before an employee shall become a candidate for any public office, the same being a salaried position, he is expected to submit his resignation to the head of the institution where he is employed."<sup>13</sup>

Professionally related activities were recently made subject to control. In the language of the Board of Trustees' resolution:

Outside employment, or practice of profession, by members of faculty and staff of the several institutions of higher learning is authorized provided . . . that it does not bring discredit to the institution and that it does not bring the employee into antagonism with his colleagues, community, or the State of Mississippi, including the Board of Trustees of Institutions of

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<sup>5</sup>Miss. CODE ANN. §§ 4064-01, -05 (1956).

<sup>6</sup>384 U.S. 11 (1966).

<sup>7</sup>387 Sup. Ct. 675 (1967).

<sup>8</sup>*Id.* at 685.

<sup>9</sup>Miss. CODE ANN. §§ 6282-41, -42 (Supp. 1964).

<sup>10</sup>364 U.S. 479 (1960).

<sup>11</sup>Mississippi State Conference of Am. Ass'n of Univ. Professors v. Holmes, No. WC6625, N.D. Miss., July 21, 1966.

<sup>12</sup>See, e.g., IND. ANN. STAT. § 60-1341 (1961).

<sup>13</sup>BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING, BY-LAWS AND POLICIES 57 (Jackson, Miss., 1964).

Higher Learning . . . and that employees wishing to engage in such employment or practice shall submit applications to their respective executive heads of institutions for approval before beginning or continuing such activity.<sup>14</sup>

The impact of this regulation is, as yet, unclear. So far there is no sure sign of the spirit or particularity with which it shall be administered. Would the regulation prohibit a French instructor attending a convention of the Modern Languages Association from filling in as a panel discussant and collecting the small honorarium, or must he hold off until he can get approval from his campus? Would it prohibit a member of the law faculty from accepting assignment as defense counsel for an indigent, accused felon and thus placing himself in a position adverse to the state? Both hypotheticals are within the literal wording of the regulation. At the moment no one can answer authoritatively.

## II. THE CONTENT OF THE CURRICULUM

There are three legal conditions which may prevail in regard to a specific curricular item written into the law.<sup>15</sup> First, state law may require that the item be taught in all public schools. Mississippi so requires the teaching of the duties and obligations of citizenship, patriotism. Americanism, and respect for and obedience to law.<sup>16</sup> Second, permissive legislation may authorize an item's inclusion in the curriculum at the option of the local school board. In Mississippi statutes so authorize the inclusion of music<sup>17</sup> and automobile driver training.<sup>18</sup> Third, a particular teaching may be prohibited in all of the public schools of the state. Doctrinal, sectarian, or denominated teaching is so prohibited, by statute in Mississippi's public schools.<sup>19</sup>

A survey of this vast and diverse nation reveals a wide variety of items which state laws include in, or exclude from, the curriculum. The Utah Constitution requires that the metric system be taught in the public schools of that state.<sup>20</sup> A Wisconsin statute requires instruction

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<sup>14</sup>Resolution adopted by the Board of Trustees of State Institutions of Higher Learning, November 17, 1966, (Official Minutes Book, Office of the Executive Secretary of the Board of Trustees of State Institutions of Higher Learning, Jackson, Miss.).

<sup>15</sup>Reutter, *The Law and the Curriculum*, 20 LAW & CONTEMP. PROB. 91, 92 (1955).

<sup>16</sup>MISS. CODE ANN. § 6216-07 (Supp. 1964).

<sup>17</sup>MISS. CODE ANN. § 6216-02 (Supp. 1964).

<sup>18</sup>MISS. CODE ANN. § 6232-72 (Supp. 1964).

<sup>19</sup>MISS. CODE ANN. § 6216-11 (Supp. 1964).

<sup>20</sup>UTAH CONST. art. 10, § 11.

in the true and comparative vitamin content and food and health values of dairy products and their importance for human diet.<sup>21</sup> Texas requires instruction to be given on acts regarding kindness to animals and the protection of birds and their nests and eggs.<sup>22</sup>

On the prohibitory side, Tennessee forbids the teaching of evolution.<sup>23</sup> Michigan expressly prohibits any instruction in birth control.<sup>24</sup> For three decades Georgia required all teachers on the public payroll to refrain from teaching any theory of government or economics or of social relations inconsistent with the fundamental principles of patriotism and the high ideals of Americanism.<sup>25</sup>

The Georgia restriction was considered by a three judge federal district court which found it to embody unconstitutional vagueness, denial of due process and a prohibited inhibition on the first amendment right to freedom of speech.<sup>26</sup> Other curriculum measures which have been held constitutionally deficient include: obligatory participation in the pledge of allegiance to the flag,<sup>27</sup> the daily recitation of a twenty-two word, non-sectarian prayer,<sup>28</sup> the daily reading of ten verses of the Bible in a devotional exercise,<sup>29</sup> excusal from study hall for "inbuilding" sectarian instruction,<sup>30</sup> and the prohibition of instruction in a foreign language.<sup>31</sup> The governance of public schools is "state action" and is therefore susceptible to the provisions of the fourteenth amendment.<sup>32</sup>

### III. SELECTION OF TEXTBOOKS

In the choice of textbooks the selection commission has wide discretion, for as a general rule the courts will neither order it to include<sup>33</sup> nor exclude<sup>34</sup> any particular publication. Occasionally, statutes have

<sup>21</sup>WIS. STAT. ANN. § 40.46 (1966).

<sup>22</sup>TEX. REV. CIV. STAT. art. 2911 (1965).

<sup>23</sup>TENN. CODE ANN. § 49-1922 (1966); *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927).

<sup>24</sup>MICH. STAT. ANN. § 15.3782 (1959).

<sup>25</sup>GA. CODE ANN. § 32-1022 (1952).

<sup>26</sup>*Georgia Conference of Am. Ass'n of Univ. Professors v. Board of Regents*, 246 F. Supp. 553 (N.D. Ga. 1965).

<sup>27</sup>*West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>28</sup>*Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>29</sup>*School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

<sup>30</sup>*McCullum v. Board of Educ.*, 333 U.S. 203 (1948).

<sup>31</sup>*Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>32</sup>*West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

<sup>33</sup>See Comment, *Schoolboards, Schoolbooks and the Freedom to Learn*, 59 YALE L.J. 928, 950 n.101 (1950).

<sup>34</sup>*Rosenberg v. Board of Educ.*, 196 Misc. 542, 92 N.Y.S.2d 344 (Sup. Ct. 1949).

been enacted: 1) to outlaw all texts espousing a particular doctrine or, 2) to bar the writings of those authors who embrace a particular doctrine. Mississippi has taken the former alternative in declaring it to be unlawful for any teacher, textbook commission, or other authority to adopt or use a textbook that teaches the doctrine that mankind ascended or descended from the lower order of animals.<sup>35</sup> The legislatures of Alabama and Texas followed the second alternative in requiring all school textbooks to bear certificates that the authors were not communists or ex-communists and stating whether they had belonged to an organization on the Attorney General's list.<sup>36</sup>

In 1960 controversy arose when it was publicized that some textbooks then in use in Mississippi's public schools taught integration, one-worldism and alien ideology.<sup>37</sup> On March 28, 1960, a bill was introduced in the State Senate seeking to curb the statutory power of the State Superintendent of Education to appoint rating committees of not more than seven experienced teachers or supervisors who were tasked with recommending textbooks for, and precluding textbooks from, state-wide adoption.<sup>38</sup> The Senate bill sought to reconstitute these seven-man rating committees so that they would be composed of three competent experienced teachers or supervisors to be appointed by the State Superintendent of Education and four gubernatorial appointees.<sup>39</sup> The bill passed the Senate handily.<sup>40</sup> When it appeared that the bill's passage by the House was in jeopardy, the Governor dispatched the following letter:

Message from the Governor  
May 5, 1960  
To the Members of the Mississippi  
House of Representatives:

Gentlemen:

I would like to direct your attention to Senate Bill No. 1979 now pending in the House of Representatives.

It is my considered judgment that this is one of the most important pieces of legislation that has been before the Legis-

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<sup>35</sup>MISS. CODE ANN. § 6798 (1956).

<sup>36</sup>ALA. CODE tit. 52, § 433(6a) (1958); TEX. REV. CIV. STAT. art. 6252-7 (1962).

<sup>37</sup>Clarion Ledger-Jackson Daily News, April 10, 1960, § A, p. 2, col. 4-5; Jackson Daily News, April 14, 1960, § A, p. 1, col. 5-8; *id.*, May 6, 1960, § A, p. 2, col. 4-5.

<sup>38</sup>MISS. S. JOUR. 1960, at 346.

<sup>39</sup>MISS. LAWS 1960, ch. 310, at 455.

<sup>40</sup>MISS. S. JOUR. 1960, at 742.

lature at this session. Failure of the House to act favorably upon this Bill will, I much fear, hamper our efforts to clean up our public school textbooks and to give to our children the instructional material that they must have if they are to be properly informed of the Southern and true American way of life. . . .

I cannot too strongly urge your favorable action on this very important measure. . . .

Sincerely,  
Ross R. Barnett,  
Governor<sup>41</sup>

The bill passed the House by a substantial margin<sup>42</sup> and was signed into law by the Governor on May 11, 1960.<sup>43</sup>

#### IV. CONSTITUTIONAL NORMS & SPEAKER BANS<sup>44</sup>

However foolish or unwise it might seem, a publicly supported college or university could constitutionally close its doors to all outside speakers.<sup>45</sup> The Constitution does not guarantee the most enlightened policies, it only requires that governmental action be fundamentally fair.<sup>46</sup>

Careful research failed to uncover any state-supported college or university in this country which bars all off-campus speakers. The real focus of concern, then, becomes the regulation of speakers and speeches, in short—of speech—by an agency of the state. When a state agency undertakes the regulation of speech, the guarantees of the federal constitution are immediately engaged. It is no longer open to doubt that freedom of speech is within the liberty safeguarded by the due process clause of the fourteenth amendment from invasion by state action.<sup>47</sup> The concept of state action embraces all state agencies, "Boards of Education not excepted."<sup>48</sup> It seems profitable, therefore, to survey

<sup>41</sup>Miss. H.R. JOUR. 1960, at 943.

<sup>42</sup>Miss. H.R. JOUR. 1960, at 947-48.

<sup>43</sup>Miss. Laws 1960, ch. 310, at 455; codified in Miss. CODE ANN. § 6641 (Supp. 1964).

<sup>44</sup>It is not within the scope of this comment to probe the continuing vitality of the *in loco parentis* doctrine, nor is it the intent of this comment to controvert categorically the imposition of a speakers ban. That doctrine and the device of the speakers ban are, *arguendo*, accepted as part of the institutional structure. This comment will focus rather on what is constitutionally permissible and impermissible in the formulation and administration of a campus speakers ban.

<sup>45</sup>*Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P.2d 885, 892 (1946); *Ellis v. Allen*, 4 App. Div. 2d 343, 165 N.Y.S.2d 624 (1957); *cf.* Annot., 94 A.L.R.2d 1274 (1964).

<sup>46</sup>*Hebert v. Louisiana*, 272 U.S. 312 (1926).

<sup>47</sup>*Near v. Minnesota*, 283 U.S. 697, 707 (1931).

<sup>48</sup>*West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

the cases in point and to see what constitutional norms the fourteenth amendment imports into the regulation of guest speakers from off-campus.

A leading writer in the field notes that at least four times in recent years courts have intervened to invalidate campus speaker bans on constitutional grounds.<sup>49</sup> In *Danskin v. San Diego Unified School Dist.*,<sup>50</sup> *American Civil Liberties Union v. Board of Educ.*,<sup>51</sup> and *Buckley v. Meng*,<sup>52</sup> the state courts expounded at length on the federal constitutional issues involved. (In a keenly analogous area state courts have four times ruled against litigants seeking to bar on-campus appearances by unpopular figures.)<sup>53</sup> On the only occasion a speakers ban has reached the United States Supreme Court, it was dismissed on the ground that certiorari had been improvidently granted.<sup>54</sup>

From a study of the principal state cases and precedents cited therein the following constitutional principles may be grasped:

A) *The Constitutional Ban on Abridgment of Speech.* There are—it is conceded—exceptions to this blanket injunction. Oral expressions designed to precipitate acts of violence are clearly punishable. A favorite illustration is the case of an individual who falsely shouts “fire” in a crowded theater.<sup>55</sup> In *Schenck v. United States* the United States Supreme Court adopted as the standard for judging the constitutionality of restraints on speech the following test:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the legislature] has a right to prevent.<sup>56</sup>

Under the “clear and present danger” test or its modified formulation in *Dennis v. United States*<sup>57</sup> there arises the subtle task of balancing the

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<sup>49</sup>Van Alstyne, *The Campus Must Be Open To All Speakers*, College Management, December, 1966, p. 32.

<sup>50</sup>28 Cal. 2d 536, 171 P.2d 885 (1946).

<sup>51</sup>10 Cal. Rptr. 647, 359 P.2d 45 (1961), *cert. denied*, 368 U.S. 819 (1961).

<sup>52</sup>230 N.Y.S.2d 924 (Sup. Ct. 1962).

<sup>53</sup>*Cannon v. Towner*, 188 Misc. 955, 70 N.Y.S.2d 303 (Sup. Ct. 1947); *Egan v. Moore*, 20 App. Div. 2d 150, 245 N.Y.S.2d 622 (1963), *aff'd*, 14 N.Y.2d 775, 250 N.Y.S.2d 809, 199 N.E.2d 842 (1964); *East Meadow Community Concerts Ass'n v. Board of Educ.*, 19 N.Y.2d 605, 278 N.Y.S.2d 393 (1967); *Donato v. Board of Educ.*, N.Y. Sup. Ct., Westchester Co., Jan. 30, 1967.

<sup>54</sup>*Ellis v. Dixon*, 349 U.S. 458 (1955).

<sup>55</sup>*Schenck v. United States*, 249 U.S. 47, 52 (1919).

<sup>56</sup>*Ibid.*

<sup>57</sup>341 U.S. 494, 510 (1951): “In each case [courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”

baneful effects of abridgment against the evil thereby averted.<sup>58</sup>

University administrators and other officials have experienced difficulty in deftly striking the permissible balance. Harried by the prospect of irate alumni, captious trustees, or parsimonious legislators, they may classify as dangerous the merely unpopular,<sup>59</sup> they may label as imminent, notions which commend themselves rather to slow rumination,<sup>60</sup> and they may fashion remedies which sweep over-broadly and constitute a prior restraint.<sup>61</sup> Many of those prevented from speaking on state university campuses would have advocated lawful conduct only. They would have proposed actions which, no matter how disagreeable to university officials, could not lawfully be proscribed. The legalization of abortion or the abolition of the State Sovereignty Commission by a vote of the legislature could not be punished. Therefore, speeches which urge such action by constitutional means are equally inviolate. The same would be true of speeches urging the impeachment of Chief Justice Earl Warren, withdrawal from the United Nations, or a grand jury investigation of the Childhood Development Group in Mississippi (CDGM). Since the type of action urged is not censurable, neither can the prevailing majority, in order to insulate itself from change, censor speech designed to bring about such action.

B) *The Procedural Safeguard of Due Process.* The state's power to regulate on-campus activities must be exercised in a manner consonant with the constitutional guarantee to due process of law.<sup>62</sup> If a state undertakes to restrain unlawful advocacy, it must provide procedures which safeguard against infringement of constitutionally protected rights.<sup>63</sup> Although denials of due process are endlessly varied, two recurrent faults stand out as especially to be avoided in the drafting of campus speaker bans: vagueness and overbreadth.

As the United States Supreme Court enunciated in a recent case, "[A] law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ

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<sup>58</sup>See generally Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

<sup>59</sup>Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885, 890 (1946): "[A] legislature that makes convictions and affiliations a condition of free speech is striking at something less than clear and present danger."

<sup>60</sup>But cf. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring): "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

<sup>61</sup>See generally Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648 (1955).

<sup>62</sup>Cohen v. Mississippi State Univ., 256 F. Supp. 954 (N.D. Miss. 1966) (semble).

<sup>63</sup>Speiser v. Randall, 357 U.S. 513, 521 (1958).

as to its application violates due process of law.”<sup>64</sup> Confronted with the same fault in an academic setting the Court declared: “The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution.”<sup>65</sup> That same vice of vagueness turned out to be the achilles’ heel of the speakers ban at Hunter College in Manhattan. In his decision striking down the ban, the judge reasoned that as long as it was possible for reasonable men to differ as to what a given standard meant, that standard could not properly serve as a basis for deprivation of first amendment rights.<sup>66</sup>

Overbreadth avoids the pitfalls of vagueness by offering the necessary specificity, but fails constitutional tests by cutting an unduly wide swath. Discovering this defect in a state statute affecting teachers, the Supreme Court held:

[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.<sup>67</sup>

In an even more recent case regarding a speakers ban, the California Supreme Court also said that a statute overly broad in its terms or coverage amounts to a denial of due process.<sup>68</sup>

C) *Equal Protection Guarantee*. A rule which accords to some the opportunity to speak on a publicly supported campus while denying that same opportunity to others is suspect under the equal protection clause of the fourteenth amendment as a capricious or arbitrary regulation. A state university is constitutionally obligated to accord equal protection to all those within its precincts.<sup>69</sup> It is well established that a municipality cannot deny use of a public building to one organization while permission is freely granted to similar organizations to use the building for public assembly and discussion.<sup>70</sup> In the Hunter College case the court struck down the ban and condemned the state for allowing its facilities to be used by proponents of the majority opinion while

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<sup>64</sup>Baggett v. Bullitt, 377 U.S. 360, 367 (1964). See generally Note, *Due Process Requirement of Definiteness in Statutes*, 62 HARV. L. REV. 77 (1948).

<sup>65</sup>Cramp v. Board of Pub. Instruction, 368 U.S. 278, 287 (1961).

<sup>66</sup>Buckley v. Meng, 35 Misc. 2d 467, 230 N.Y.S.2d 924, 930 (Sup. Ct. 1962).

<sup>67</sup>Shelton v. Tucker, 364 U.S. 479, 488 (1960).

<sup>68</sup>American Civil Liberties Union v. Board of Educ., 28 Cal. Rptr. 700, 709, 379 P.2d 4, 13 (1963) (dictum).

<sup>69</sup>McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

<sup>70</sup>Bynum v. Schiro, 219 F. Supp. 204 (E.D. La. 1963).

denying them to dissenters.<sup>71</sup> The California Supreme Court, in overturning a speakers ban, held that the state could not restrict the use of its school buildings to groups with convictions and affiliations which it deemed acceptable.<sup>72</sup> Although the state is under no duty to make school buildings available for public gatherings, should it elect to do so, it is then required by the Constitution to grant the use of its facilities in a reasonable and non-discriminatory manner, equally applicable to all and administered with equality to all.<sup>73</sup>

A useful corollary to the equal protection and due process doctrines explored above is the simple principle that what the state cannot do directly, it may not do indirectly.<sup>74</sup> The California Supreme Court applied this corollary to hold that the state could not impose an unconstitutional requirement as a condition for granting a privilege even though that privilege was the use of a public school building.<sup>75</sup>

D) *Reasonable Time, Place, and Manner*. Nothing in the foregoing discussion should be read as deprecating the authority of university officials to set reasonable standards over the time, place, and manner of proposed appearances. As was pointed out in *Stanton v. Board of Educ.*,<sup>76</sup> "The rights of speech and assembly are subject to the rights of others, as well as of the state."<sup>77</sup> A university may properly subordinate requests for the use of its facilities by guest speakers to all of its regularly scheduled activities. It may in two situations deny its facilities to guest speakers: 1) when the speech is of a constitutionally unprotected sort, *e.g.*, obscenity or advocacy of the violent overthrow of the government, or 2) seriously disruptive of the educational undertaking, *e.g.*, a raucous assembly on the steps of the library.

#### V. MISSISSIPPI'S SPEAKER BANS

Mississippi's former speaker ban was contained in a brief resolution of the Board of Trustees of State Institutions of Higher Learning dated February 17, 1955:

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<sup>71</sup>Buckley v. Meng, 35 Misc. 2d 467, 230 N.Y.S.2d 924, 934 (Sup. Ct. 1962).

<sup>72</sup>Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885, 892 (1946).

<sup>73</sup>East Meadow Community Concerts Ass'n v. Board of Educ., 18 N.Y.2d 129, 272 N.Y.S.2d 341 (1966).

<sup>74</sup>Buckley v. Meng, 35 Misc. 2d 467, 230 N.Y.S.2d 924, 934 (Sup. Ct. 1962). See generally Singh, "What Cannot Be Done Directly Cannot Be Done Indirectly": Its Meaning and Logical Status in Constitutionalism, 29 MODERN L. REV. 273 (1966).

<sup>75</sup>Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885, 891 (1946).

<sup>76</sup>190 Misc. 1012, 76 N.Y.S.2d 559 (Sup. Ct. 1948).

<sup>77</sup>*Id.*, 76 N.Y.S.2d at 562.

All speakers invited to the campus of any of the state institutions of higher learning must first be investigated and approved by the head of the institution involved and when invited the names of such speakers must be filed with the Executive Secretary of the Board of Trustees.<sup>78</sup>

The 1955 resolution would probably have succumbed to a challenge on constitutional grounds since there were no standards to guide the exercise of this delegated authority.<sup>79</sup> The heads of the institutions were in no wise instructed as to what standard or standards should guide them: widest academic exploration, tranquil relations with the Board, greater favor with the legislature, keeping the campus free from controversy, etc. As was pointed out in another speakers ban case, a licensing system will stand only if the standards governing the issuance of the license are so clear as to obviate arbitrary and discriminatory action.<sup>80</sup> Under the 1955 resolution there simply were no standards. Thus the 1955 resolution seems to fall squarely under *Staub v. City of Baxley*<sup>81</sup> in which the Court held that an ordinance making the enjoyment of constitutionally protected freedoms contingent upon the uncontrolled will of an official was an unconstitutional exercise of censorship and prior restraint.

The 1955 resolution survived for over a decade without serious challenge. However, in October 1966, President William L. Giles of Mississippi State University denied approval to a proposed invitation from the campus chapter of the Young Democrats to State NAACP President Aaron Henry to address that campus political club. In the wake of the turndown the campus newspaper ran editorials denouncing the ban, various faculty members offered expressions of concern, and the campus political club made preparations to test the constitutionality of the 1955 resolution in federal court. The following month President Giles appeared at the monthly meeting of the Board of Trustees in Jackson to announce that he had, upon reconsideration, decided to approve the invitation to Aaron Henry to speak on campus.

Explaining his new position, President Giles told the Board of Trustees that:

[T]he slanting of the news releases which would result from the lawsuit, the long drawn out waste of time when we know already what the conclusion would be, the anticipated

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<sup>78</sup>BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING, BY-LAWS AND POLICIES 43 (Jackson, Miss., 1964).

<sup>79</sup>See Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965).

<sup>80</sup>*Buckley v. Meng*, 35 Misc. 2d 467, 230 N.Y.S.2d 924, 929 (Sup. Ct. 1962).

<sup>81</sup>355 U.S. 313, 322 (1958).

bad morale situation which could accurately be foretold for the campus, the difficulty that the legal entanglement would focus on our recruitment of faculty members—these and related considerations—have moved me to change my position.<sup>82</sup>

Then, according to the official minutes of the Board, the 1955 resolution was superseded by the following:

“Henceforward names of anticipated visiting speakers at the several institutions of higher learning shall be furnished in advance of release of invitation not only to the Executive Secretary as heretofore but also to each member of the Board; and the executive heads of the several institutions will be charged with the responsibility of not approving invitations for speakers who will do violence to the academic atmosphere of the respective institutions; and persons in disrepute in the area from which they come, and those charged with crimes or other moral wrongs shall not be invited; and there will be no invitation to any person who advocates a philosophy of the overthrow of the government of the United States.<sup>83</sup>

Under the 1966 resolution five categories of mandatory prohibition have been added to cover speakers who:

- 1) will do violence to the academic atmosphere;
- 2) are in disrepute in the area from which they come;
- 3) are charged with crimes;
- 4) are charged with [non-criminal] moral wrongs; or
- 5) advocate a philosophy of the overthrow of the government of the United States.

These five categories appear to present a bevy of constitutional problems.

The first categorical exclusion—those who will do violence to the academic atmosphere—will, barring an attack on grounds of vagueness, probably meet the constitutional test if it is strictly applied since it appears rationally to foster an important state activity and does not, on its face, sweep overbroadly.<sup>84</sup> As the Court has pointed out, freedom of speech does not mean that one can talk where, when and how one

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<sup>82</sup>The (Mississippi State University) Reflector, November 18, 1966, p. 1, col. 1. President Giles has confirmed the quotation above as “essentially accurate.” Letter from President William L. Giles to writer, Feb. 20, 1967.

<sup>83</sup>Resolution adopted by the Board of Trustees of State Institutions of Higher Learning, November 17, 1966 (Official Minutes Book, Office of the Executive Secretary of the Board of Trustees of State Institutions of Higher Learning, Jackson, Miss.).

<sup>84</sup>Sherbert v. Verner, 374 U.S. 398, 406-07 (1963) (*semble*).

chooses.<sup>85</sup> If vagueness were made the brunt of the challenge, "violence to the academic atmosphere" might well be held a constitutionally deficient label in the absence of any standards for ascertainment.

The second categorical exclusion—those in disrepute in the area from which they come—raises serious constitutional objections. As the New York court stated in overturning a similar ban:

We do not take it that [a school board] may discriminate against an organization simply because it, or even a part of the public, may be hostile to the opinions or the program of such organization provided the same are not unlawful *per se*.<sup>86</sup>

This exclusionary standard is also susceptible to be faulted on the inherent vagueness of the term "area." If, for example, the President of the University of Southern Mississippi were asked by a student group to approve an invitation to the controversial Georgia legislator Julian Bond, who expressed admiration for the courage of draft card burners,<sup>87</sup> what should he consider as the appropriate area in which to check for "disrepute?" Unable to find disrepute in Georgia's 136th House District which Bond was elected to represent by a vote of 2,320 to 487,<sup>88</sup> arguably he could proceed to consider the City of Atlanta, Fulton County, the State of Georgia, or, indeed, the whole South. This vagueness surrounding the term "area" constitutes a fatal defect since "as long as it is possible for reasonable men to differ as to what a given standard means, that standard cannot properly serve as a basis for a limitation on First Amendment rights."<sup>89</sup>

The third categorical exclusion—those charged with crimes—is, in effect, an imposition of civil disabilities by a quasi-legislative board without the protections afforded by the judicial process. Civil disabilities so imposed constitute a bill of attainder, prohibited by article I, section 10 of the Constitution. As interpreted by the Supreme Court, that clause prohibits all legislative acts no matter what their form, which apply to named individuals or to easily ascertainable members of a group in such a manner as to inflict punishment on them without judicial trial.<sup>90</sup> As the Supreme Court had earlier pointed out, the punishment inherent in a bill of attainder could consist of the deprivation of any rights, civil or political, which had been previously enjoyed.<sup>91</sup> As was

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<sup>85</sup>Breard v. Alexandria, 341 U.S. 622, 642 (1951).

<sup>86</sup>Ellis v. Allen, 4 App. Div. 2d 343, 165 N.Y.S.2d 624, 627 (1957).

<sup>87</sup>Bond v. Floyd, 251 F. Supp. 333, 347 (N.D. Ga. 1966).

<sup>88</sup>Bond v. Floyd, 87 Sup. Ct. 339, 341 (1966).

<sup>89</sup>Buckley v. Meng, 35 Misc. 2d 467, 230 N.Y.S.2d 924, 930 (Sup. Ct. 1962).

<sup>90</sup>United States v. Lovett, 328 U.S. 303, 315 (1946).

<sup>91</sup>Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 320 (1866).

stressed in *United States v. Brown*,<sup>92</sup> the fact that a statute inflicts its deprivation upon a group of people rather than a list of named individuals does not take it out of the category of bills of attainder. The *Brown* case also stands for the proposition that constitutional provisions against bills of attainder extend to statutes having preventive purposes, such as the regulation under discussion, as well as to statutes having retributive purposes.<sup>93</sup>

Bills of attainder having thus been held to violate the due process clause of the federal constitution, they would, it appears, also violate the due process clause of the Mississippi Constitution.<sup>94</sup>

More specifically, if a person were to examine the origin and the administration of the November 17 resolution, he could conclude that the resolution was a device designed to bar State NAACP President Aaron Henry from further appearances on Mississippi's state college campuses. For it was upon being told by President Giles of his decision to allow Henry to appear on the Mississippi State University campus that the Board of Trustees, at that same meeting,<sup>95</sup> replaced the 1955 resolution with this far more stringent ban. The language of the new resolution—as this comment suggests—is not inconsistent with its having been drafted spontaneously. The one precise ground among the five bases for exclusion is that of being charged with a crime. A charge of breach of the peace is outstanding against Aaron Henry.<sup>96</sup>

The administration of the new speakers ban does no violence to this view. One month prior to the November Board resolution the Chancellor of the University of Mississippi approved an invitation to Aaron Henry to address a group on campus. Since the passage of the November Board resolution, the Chancellor of the University of Mississippi has after consultation with the Board of Trustees, felt constrained to disapprove two similar invitations to Aaron Henry.

The fourth exclusionary category—those charged with [non-criminal] moral wrongs—is suspect in its vagueness. Having laid aside the criminal code, how can the “other moral wrongs” which constitute this category be identified? Substantial support could be found through-

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<sup>92</sup>381 U.S. 437, 461 (1965).

<sup>93</sup>*Id.* at 458-59.

<sup>94</sup>Miss. CONST. art. 3, § 14.

<sup>95</sup>It is also noteworthy that this was the first meeting of the Board of Trustees since the announcement of Henry's November 17 lecture to the Political and Civil Rights class at the University of Mississippi Law School, the only other appearance Henry has ever made on a Mississippi state campus.

<sup>96</sup>*Henry v. State*, 154 So. 2d 289 (advance sheets) (1963); withdrawn on rehearing and supplanted by *Henry v. State*, 253 Miss. 263, 154 So. 2d 289 (permanent edition) (1963) reversed and remanded *Henry v. Mississippi*, 379 U.S. 443 (1965); reaffirmed *Henry v. State*, 198 So. 2d (1967).

out the state for labelling as morally wrong: sharp commercial practices, intolerance on the basis of nationality, most if not all divorces, trafficking in tobacco or liquor, the use of birth control devices, and a host of other infractions of an increasingly creedal quality. Thus the category could be read to include the Right Reverend James A. Pike, the controversial California cleric against whom charges of heresy were preferred in the Episcopal House of Bishops by fourteen clergymen of the diocese of Arizona.<sup>97</sup> Leander Perez, prominent Louisiana political figure and ex-communicant<sup>98</sup> could, with equal plausibility, be subjected to the ban imposed by this category. Clearly this category of the 1966 resolution is vitiated by its own vagueness since a statute which forbids or requires the doing of an act in terms so vague that men must guess at its meaning and differ as to its application, violates due process of law.<sup>99</sup>

The final category of mandatory exclusion—those who advocate a philosophy of the overthrow of the government of the United States—faces at least three pitfalls.

First, to be proscribable as unlawful conduct, the advocacy must violate the terms of the Smith Act,<sup>100</sup> since state statutes in this area have been superseded by federal legislation.<sup>101</sup> Under the language of the Smith Act the forbidden advocacy is that of overthrow “by force and violence.” The Smith Act does not prohibit the advocacy of peaceful change in our economic, political, or social institutions, no matter how fundamental, far-reaching, or drastic such proposals may be.<sup>102</sup> Thus, in failing to stipulate that the advocacy prohibited is that of overthrow “by force and violence,” the November 17th resolution sweeps overbroadly and infringes upon lawful utterance. A governmental purpose to prevent or control activities constitutionally subject to regulation may not be achieved through means that sweep unnecessarily broadly and thus invade the area of constitutionally protected freedoms.<sup>103</sup>

Second, the breadth of the injunctive language in the resolution would seem to encompass even advocacy of overthrow as an abstract doctrine in academic discussion. Yet, the United States Supreme Court has held that the advocacy of forcible overthrow of the government as an abstract principle, divorced from any effort to instigate action to

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<sup>97</sup>82 *Christian Century* 1051 (1965).

<sup>98</sup>*N.Y. Times*, April 17, 1962, p. 1, col. 2.

<sup>99</sup>*Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

<sup>100</sup>18 U.S.C. § 2385 (1964).

<sup>101</sup>*Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956); thus we must pass over the Mississippi sedition statute, *MISS. CODE ANN.* § 4064-10(c) (1956).

<sup>102</sup>*United States v. Foster*, 9 F.R.D. 367, 394 (S.D.N.Y. 1949).

<sup>103</sup>*Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964).

that end, is within the first amendment's protection of free speech.<sup>104</sup> Hence, the November 17th resolution is defective on yet another ground.

Third, the resolution errs in speaking in terms of prohibited persons rather than prohibited activities.<sup>105</sup> Thus, if the L. Q. C. Lamar Society of International Law, at the University of Mississippi, were to propose sending invitations to the legal advisors of the five permanent members of the United Nations Security Council for an on-campus colloquium on international law, the ban would come into play. The Soviet legal advisor, a ranking and politically acute Russian national, presumably gives at least perfunctory assent to the desirability of seeing non-communist governments overthrown. The fallacy in imposing the ban in this situation is readily discernable. Not all action urged by such a person can be punished. Communists on occasion advocate admission of mainland China into the United Nations or economic embargo of South Africa over the latter's policy of apartheid. Speeches advocating these objectives cannot be prevented merely because they are delivered by persons who also harbor the view—but not then expressed—that violent overthrow of the government is desirable.<sup>106</sup>

In sum, although there can be no doubt of the legitimacy of a state's interest in protecting its educational system from subversion, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.<sup>107</sup>

Taken *in toto*, with all five of its categories of mandatory exclusion, the speakers ban could probably be attacked as an infringement of the right of free assembly guaranteed by article 3, section 11 of the Mississippi Constitution.

## VI. OBTAINING JUDICIAL REDRESS

The courts have traditionally been chary about intervening in academic matters, feeling that they were ill-fitted to resolve such disputes. In *Minersville School Dist. v. Gobitis*,<sup>108</sup> Mr. Justice Frankfurter stressed that the courtroom was not the arena for debating issues of educational policy.<sup>109</sup> Such, however, has come to be distinctly a minority view. As Mr. Justice Jackson pointed out in the sequel to *Gobitis*:

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<sup>104</sup>*Yates v. United States*, 354 U.S. 298, 318 (1957).

<sup>105</sup>*DeJonge v. Oregon*, 299 U.S. 353, 365 (1937).

<sup>106</sup>See Van Alstyne, *Political Speakers at State Universities*, 111 U. PA. L. REV. 328, 335 (1963).

<sup>107</sup>*Keyishian v. Board of Regents*, 87 Sup. Ct. 675, 683 (1967).

<sup>108</sup>310 U.S. 586 (1940).

<sup>109</sup>*Id.* at 598.

We act in these matters not by authority of our competence, but by force of our commissions. We cannot, because of our modest estimate of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.<sup>110</sup>

Having settled the notion that the courts are a fit agency for redress, to which of the court systems in our federal structure should application for redress be made? A petition could be couched strictly in state terms, alleging denial of the due process guaranteed in article 3, section 14 and an impingement of the freedom of speech and assembly assured in article 3, section 11 of the Mississippi Constitution, and lodged in chancery court seeking an injunction.<sup>111</sup>

The balance of advantage, however, seems to lie with lodging the complaint in federal court in order to take advantage of its power to issue a declaratory judgment<sup>112</sup> as well as the possibility of having a three-judge district court empaneled, thereby telescoping the appellate process.<sup>113</sup> The necessary invocation of federal jurisdiction could be had under 28 U.S.C. § 1343<sup>114</sup> or 42 U.S.C. § 1983.<sup>115</sup> No prior exhaustion of state judicial or administrative remedies would be required in such a case.<sup>116</sup> It should also be noted that the jurisdiction of the federal courts under these last two statutes is not limited by any statutorily-fixed minimum amount in controversy.<sup>117</sup>

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<sup>110</sup>West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943).

<sup>111</sup>See Miss. CODE ANN. § 1335 (1956).

<sup>112</sup>28 U.S.C. §§ 2201-02 (1964).

<sup>113</sup>See 28 U.S.C. §§ 1253, 2281-84 (1964).

<sup>114</sup>28 U.S.C. § 1343 (1964), provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . .

<sup>115</sup>42 U.S.C. § 1983 (1964), provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

<sup>116</sup>McNeese v. Board of Educ., 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961).

<sup>117</sup>Douglas v. City of Jeannette, 319 U.S. 157, 161 (1943); Jordan v. Hutcheson, 323 F.2d 597 (4th Cir. 1963).

Following a seminal 1941 opinion by Mr. Justice Frankfurter,<sup>118</sup> the federal courts have developed notions of abstention designed to foster, *inter alia*, comity and efficiency.<sup>119</sup> Thus, the federal courts may decline to proceed on a matter even though they have jurisdiction.<sup>120</sup> The most clearly established exercise of such abstention is discoverable in instances where the state statute in dispute had not been authoritatively construed by that state's supreme court.<sup>121</sup> Since the speakers ban has not been definitely construed by the Mississippi Supreme Court, the prospect of abstention must be squarely considered.

Since 1964 an exception to the abstention doctrine has emerged in the first amendment area. In declining to abstain in a loyalty oath case the Court noted, "The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law. . . ." <sup>122</sup> In an even more recent case the Supreme Court stated, "We hold the abstention doctrine is inappropriate for cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression. . . ." <sup>123</sup> The Fifth Circuit held that where there is deprivation of a constitutionally guaranteed right, the duty of the federal court to use its injunctive power to interfere with the conduct of state officers cannot be avoided.<sup>124</sup> In summary, it would seem that a speakers ban case in the Fifth Circuit would escape the abstention doctrine even though the ban has not been authoritatively construed by our state Supreme Court.

There is one other doctrine of judicial restraint that merits attention. The constitutional limitation of the business of federal courts to cases and controversies has given rise to a doctrine of judicial restraint restricting litigation of official action to cases where the parties assert a direct and immediate interest, *i.e.*, "standing."<sup>125</sup> In the language of the Court: "[O]rdinarily . . . a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by

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<sup>118</sup>*Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). See Note, *Federal Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604 (1967).

<sup>119</sup>WRIGHT, *FEDERAL COURTS* § 52, at 169 (1963).

<sup>120</sup>*Ibid.*

<sup>121</sup>*Id.* at 170.

<sup>122</sup>*Baggett v. Bullitt*, 377 U.S. 360, 375 (1964).

<sup>123</sup>*Dombrowski v. Pfister*, 380 U.S. 479, 489-90 (1965). See also *Keyishian v. Board of Regents*, 87 Sup. Ct. 675, 682-83 (1967).

<sup>124</sup>*Woods v. Wright*, 334 F.2d 369 (5th Cir. 1964).

<sup>125</sup>Legislative Reference Service, Library of Congress, *The Constitution of the United States of America—Analysis and Interpretation*, S. Doc. No. 39, 88th Cong., 1st Sess. 602 (1964).

its operation.”<sup>126</sup> The complainant must further show that he suffers some particular injury not suffered by the citizenry at large.<sup>127</sup>

Under the operation of the Mississippi speakers ban, the proposed guest speaker to whom an invitation is never released simply becomes a member of that vast majority of the population who are never invited to speak on the university campus. He would encounter foreseeable difficulties in establishing that particularity of injury which is prerequisite to attaining “standing.” Such an infringement of freedom of speech need not go unredressed. It is now clear that the freedom of speech protected by the first amendment also embraces the freedom of those who wish to hear, and that persons denied access to constitutionally protected speech have standing to challenge a ban.<sup>128</sup> The primary complainants therefore should be the officers and members of the group which proposed the thwarted invitation.

## VII. CONCLUSION

The Board of Trustees’ resolution of November 17, 1966 goes beyond the prevention of unlawful advocacy and of disruptions of the educational enterprise to constitute a serious infringement of rights guaranteed by both state and federal constitutions. It is amenable to attack on most substantial grounds in the federal courts. If an attack were made in the Fifth Circuit, prospects for a decision by the Supreme Court on the whole notion of a campus speakers ban would be markedly enhanced. The North Carolina speakers ban is under attack in a district court in the Fourth Circuit.<sup>129</sup> The Supreme Court is more likely to turn its attention to questions which are involved in a multiplicity of suits arising in different circuits. This is especially so if there is a conflict in decisions among the circuits.

Turning from prediction to preference, Mississippi’s overly broad speakers ban ought to be struck down for it jeopardizes the vitality of the democratic process. As an American Bar Association publication explained:

Most of us do not speak—at least publicly—on the affairs of the nation; but all of us participate in the selection of representatives and exercise our judgment on the policies government pursues. This being the case let us recognize that the right we

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<sup>126</sup>*Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

<sup>127</sup>*Frothingham v. Mellon*, 262 U.S. 447, 488 (1923).

<sup>128</sup>*Lamont v. Postmaster General*, 381 U.S. 301 (1965).

<sup>129</sup>*Dickson v. Sitterson*, C. A. File No. 3-59-G-66 (M.D. N.C., filed Mar. 31, 1967).

defend is not the right of some isolated and often misguided speaker; we defend our own right to hear—our right to have all the information and all the interpretations necessary for an intelligent preservation of the democratic process.<sup>130</sup>

If this be true for the community as a whole, then it is even more so for the university, which is by design the community's center for inquiry, research and learning.

The late Mr. Justice Frankfurter was called upon in *Wieman v. Updegraff*<sup>131</sup> to weigh the state's interest in combating subversion through a faultily worded loyalty oath against an academician's claim to widest freedom of inquiry and expression. He concluded his well reasoned opinion with this sentence of then University of Chicago President Robert M. Hutchins:

Now, . . . the limits on this freedom cannot be merely prejudice, because although our prejudice might be perfectly satisfactory, the prejudices of our successors or of those who are in a position to bring pressure to bear on the institution might be subversive in the real sense, subverting the American doctrine of free thought and free speech.<sup>132</sup>

*Donald Reagan Stacy.*

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<sup>130</sup>Horack, *The Right to Hear*, 2 BILL OF RIGHTS REV. 6, 8 (1941).

<sup>131</sup>344 U.S. 183 (1952).

<sup>132</sup>*Id.* at 198 (concurring opinion).

## STUDENT NOTES

### CONSTITUTIONAL LAW—SYSTEMATIC EXCLUSION OF THE POOR ET AL.: THE CHANGING NOTION OF EQUAL PROTECTION

This note uses the recent Fifth Circuit decision, *Labat v. Bennett*,<sup>1</sup> as a vantage point from which to survey varieties of systematic jury exclusion. An appraisal of the *Labat* decision is ventured in the light of that background. Finally, the note explores the present inadequacy and probable expansion of remedial devices.

In an appeal to the Fifth Circuit sitting en banc from a district court denial<sup>2</sup> of habeas corpus, petitioners complained of members of their race having been "systematically limited and excluded" from the state grand and petit juries which indicted and convicted them. Counsel for petitioners contended that the practice of the jury commissioners and judges in excusing all daily wage earners had the net effect of totally excluding Negroes. In support of this contention, counsel presented a sophisticated study of statistical inference showing the excusal of daily wage earners to have impinged far more severely on Negro participation than upon white. The majority of the court, speaking through Judge Wisdom, based its reversal upon both the conceded excusal of all daily wage earners and the inferential discrimination against Negroes as violative of the fourteenth amendment. In a separate opinion Judges Bell and Coleman concurred with the majority on the basis of exclusion of per diem workers as an economic class, but refused to don the majority's "mathematical straight jacket" and infer racial discrimination as a ground for reversal.<sup>3</sup> The concurring opinion was also critical of testing "the disparity between non-white population and the number of Negroes on the jury without regard to literacy."<sup>4</sup> Judge Gewin dissented vigorously from both the reasons the majority assigned for reversal.<sup>5</sup>

Systematic exclusion from the venire has constituted a recurrent denial of equal protection, capable of assuming many forms. Exclusion on the basis of race has been the form most frequently before the courts.<sup>6</sup> Indeed, the United States Supreme Court, in one of its oft-cited opinions, expressed doubt that state action which was not directed at Negroes would violate the equal protection clause of the fourteenth amendment.<sup>7</sup> This unfortunate bit of dicta gave rise to a "two-class" theory of the equal protection clause as applying only to disparities in treatment accorded whites and Negroes. The Supreme Court was subsequently forced to disclaim the "two-class" theory and to point out

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<sup>1</sup>365 F.2d 698 (5th Cir. 1966), *cert. denied* 87 Sup. Ct. 1303 (1967).

<sup>2</sup>United States *ex rel* Poret v. Sigler, 234 F. Supp. 171 (E.D. La. 1964).

<sup>3</sup>*Labat v. Bennett*, 365 F.2d 698, 739 (5th Cir. 1966), *cert. denied* 87 Sup. Ct. 1303 (1967).

<sup>4</sup>*Id.* at 741.

<sup>5</sup>*Id.* at 729.

<sup>6</sup>*E.g.*, *Eubanks v. Louisiana*, 356 U.S. 584 (1958).

<sup>7</sup>*Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 81 (1872).

that from time to time other groups may be perceived as needing the same protection.<sup>8</sup> The Court then fashioned a generalized test of a cognizable, cohesive group being singled out for different treatment, not based on some reasonable classification.<sup>9</sup>

Examples of impermissible exclusion upon other than a racial basis include those based on political party,<sup>10</sup> religion,<sup>11</sup> ethnic minority,<sup>12</sup> social status,<sup>13</sup> economic status,<sup>14</sup> and belonging to the gentler sex.<sup>15</sup> One conviction was overturned when it was shown that Republicans had been excluded from the trial jury.<sup>16</sup> Another conviction was reversed when it was shown that the political faction opposing a sheriff was systematically excluded from the grand jury which indicted the sheriff's adversary.<sup>17</sup>

Religious minorities have also experienced the denial of equal protection in being excluded from the jury.<sup>18</sup> The failure over several years of an all-Protestant jury commission to summon a single venireman from the sizable Catholic community necessitated a reversal where the defendant was of the latter faith.<sup>19</sup> In a very recent case both the first and fourteenth amendments were invoked to overturn the conviction of a non-theist—in this case a Buddhist—by jurors who had been required to demonstrate a belief in a Supreme Being.<sup>20</sup>

Hyphenated Americans have on occasion been excluded from serving on jury panels. The United States Supreme Court reversed a conviction where Mexican-Americans were shown to have been excluded from the state grand and petit juries which indicted and convicted a Mexican-American defendant.<sup>21</sup> A federal district court was constrained to quash an indictment handed down by a grand jury from which Filipino-Americans had been deliberately excluded.<sup>22</sup> And in a celebrated bit of dicta, the Supreme Court hypothesized that protection

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<sup>8</sup>Hernandez v. Texas, 347 U.S. 475 (1954).

<sup>9</sup>*Ibid.* See also, *Dow v. Carnegie-Illinois Steel Corp.*, 224 F.2d 414, 425 (3rd Cir. 1955).

<sup>10</sup>*E.g.*, *Kentucky v. Powers*, 139 Fed. 452 (C.C.E.D. Ky. 1905), *rev'd on other grounds*, 201 U.S. 1 (1906).

<sup>11</sup>*E.g.*, *State v. Madison*, 240 Md. 265, 213 A.2d 880 (1965).

<sup>12</sup>*E.g.*, *Hernandez v. Texas*, 347 U.S. 475 (1954).

<sup>13</sup>*E.g.*, *Glasser v. United States*, 315 U.S. 60 (1942).

<sup>14</sup>*E.g.*, *Simmons v. State*, 182 So. 2d 442 (Fla. 1966).

<sup>15</sup>*E.g.*, *Roemig v. United States*, 52 F. Supp. 857 (D.C. Iowa 1944).

<sup>16</sup>*Kentucky v. Powers*, 139 Fed. 452 (C.C.E.D. Ky. 1905), *rev'd on other grounds*, 201 U.S. 1 (1906).

<sup>17</sup>*State v. McCarthy*, 76 N.J.L. 295, 69 Atl. 1075 (1908).

<sup>18</sup>This note, however, does not embrace instances where the religious beliefs of a prospective juror would lead him to view the alleged misconduct as wholly proper, *e.g.*, an old-line Mormon as a prospective juror in a polygamy case. *Territory v. Evans*, 2 Idaho 651, 23 Pac. 232 (1890).

<sup>19</sup>*Juarez v. State*, 102 Tex. Crim. 297, 277 S.W. 1091 (1925).

<sup>20</sup>*Schowgurow v. State*, 240 Md. 121, 213 A.2d 475, 480 (1965).

<sup>21</sup>*Hernandez v. Texas*, 347 U.S. 475 (1954).

<sup>22</sup>*International Longshoremen's & Ware. Union v. Ackerman*, 82 F. Supp. 65 (D.C. Hawaii 1948).

from systematic exclusion would embrace even "naturalized Celtic Irishmen."<sup>23</sup>

Neither may the jury box be closed to those lacking in social status. The United States Supreme Court was sharply critical of the federal district court in *Glasser v. United States*<sup>24</sup> for having allowed the distaff side of the jury box to become the exclusive preserve of the Illinois League of Women Voters.

The proper place of women—in law as in life—is sadly uncertain.<sup>25</sup> The traditional view is that a state may restrict jury service to men only,<sup>26</sup> and women will not be heard to complain of a denial of equal protection.<sup>27</sup> But in the federal court system where women are eligible, courts have been quick to quash an indictment<sup>28</sup> or overturn a conviction<sup>29</sup> where womenfolk have, in practice, been excluded.

A sharp break with the traditional view toward the states came last spring in the impishly-styled cause of *White v. Crook*.<sup>30</sup> A three-judge federal district court voided Alabama's statute<sup>31</sup> restricting jury service to males as violative of the equal protection clause of the fourteenth amendment. The Mississippi Supreme Court has since reiterated the traditional view on an almost identical statute<sup>32</sup> in reinstating an indictment quashed on the statutory exclusion of women from the venire.<sup>33</sup> A divided United States Supreme Court turned down an appeal, apparently due to the lack of requisite finality.<sup>34</sup>

The economic status of a prospective juror has been held irrelevant in determining competence.<sup>35</sup> In a quaint pre-fourteenth amendment case the Supreme Court of the Utah Territory threw out a statute restricting jury service to taxpayers, and—in the absence of the equal protection clause—hung its decision on the seventh amendment peg: "the right to trial by jury shall be preserved."<sup>36</sup> In *Thiel v. Southern Pac. Co.*<sup>37</sup> the United States Supreme Court invoked its supervisory power by reversing and remanding where daily wage earners had been intentionally and systematically excluded from the jury panel.

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<sup>23</sup>*Strauder v. West Virginia*, 100 U.S. (10 Otto) 303 (1879) (dictum).

<sup>24</sup>315 U.S. 60, 83-86 (1942).

<sup>25</sup>*Murray & Eastwood, Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965).

<sup>26</sup>*Brown v. Allen*, 344 U.S. 443, 471 (1953).

<sup>27</sup>*Commonwealth v. Welosky*, 276 Mass. 398, 177 N.E. 656 (1931).

<sup>28</sup>*Roemig v. United States*, 52 F. Supp. 857 (D.C. Iowa 1944).

<sup>29</sup>*Ballard v. United States*, 329 U.S. 187 (1946).

<sup>30</sup>251 F. Supp. 401 (D.C. Ala. 1966).

<sup>31</sup>ALA. CODE, tit. 30, § 21 (1958).

<sup>32</sup>MISS. CODE ANN., § 1762 (1956).

<sup>33</sup>*State v. Hall*, 187 So. 2d 861 (Miss. 1966).

<sup>34</sup>*Hall v. Mississippi*, 87 Sup. Ct. 331, (1966).

<sup>35</sup>*Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1945).

<sup>36</sup>*Reece v. Knott*, 3 Utah 451, 24 Pac. 757 (1861). *Contra*, *State v. McDowell*, 61 Wash. 398, 112 Pac. 521 (1911).

<sup>37</sup>328 U.S. 217 (1945).

In sharp contrast to the customary reversal where the exclusion practiced falls into one of the categories detailed above, the courts have refused to intervene where (1) the excluded group lacked cohesiveness,<sup>38</sup> or (2) the group's exclusion was based upon a reasonable classification.<sup>39</sup> Non-voters, for example, were held to be united only in disinterest, and therefore not sufficiently cohesive to vitiate a panel drawn from registration lists.<sup>40</sup> In another case persons convicted of a crime and thereafter pardoned were held not to constitute a cohesive, cognizable class.<sup>41</sup> Persons age 21-25 were not found to be so cohesive a group that their omission from the array would require reversal.<sup>42</sup>

Under the "reasonable classification" notion the Court of Appeals for the Seventh Circuit upheld the exclusion from the jury panel of those lacking an eighth grade education.<sup>43</sup> The same notion led the Court of Appeals for the Ninth Circuit to uphold the conviction of a minor for draft evasion, notwithstanding the fact that minors were barred from the grand jury.<sup>44</sup> In *Rawlins v. Georgia*<sup>45</sup> the United States Supreme Court, speaking through Justice Holmes, upheld a then-not-uncommon exclusion of dentists, doctors, ministers, railroad engineers, and others whose uninterrupted services were reasonably related to the good of the community.

The case under analysis, *Labat v. Bennett*, is noteworthy not only for the substantive doctrine it sets forth, but also for the insight it allows into the evolution of equal protection theory. Over lower federal courts the Supreme Court yields not only the constitutional bans and guarantees, but ample supervisory control as well.<sup>46</sup> In the area of state court convictions the United States Supreme Court "is limited to the enforcement of those fundamental principles of liberty and justice which are secured by the Fourteenth Amendment. . . ."<sup>47</sup> But this situation is not as static as it might at first appear. For as Justice Douglas explained in a recent majority opinion, "Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change."<sup>48</sup> Thus, notions of what constitute wise policy in the federal system can, over time, be seen to enter by osmosis into the federal courts' reading of the fourteenth amendment. In the *Labat* case a federal appellate court has, for the first time, put the states on notice that the *Thiel* doctrine—that day laborers as a class are not to be excluded—now inheres to the fourteenth amendment's equal protection clause.

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<sup>38</sup>*E.g.*, *United States v. Greenberg*, 200 F. Supp. 382 (S.D.N.Y. 1961).

<sup>39</sup>*E.g.*, *Rawlins v. Georgia*, 201 U.S. 638 (1906).

<sup>40</sup>*United States v. Greenberg*, 200 F. Supp. 382 (S.D.N.Y. 1961).

<sup>41</sup>*United States v. Ware*, 237 F. Supp. 849 (D.D.C. 1964).

<sup>42</sup>*King v. United States*, 346 F.2d 123 (1st Cir. 1965).

<sup>43</sup>*United States v. Henderson*, 298 F.2d 522, *cert. denied*, 369 U.S. 878 (1961).

<sup>44</sup>*George v. United States*, 196 F.2d 445, 453 (9th Cir. 1952).

<sup>45</sup>201 U.S. 638 (1906).

<sup>46</sup>*McNabb v. United States*, 318 U.S. 332, 340 (1943).

<sup>47</sup>*Ibid.*

<sup>48</sup>*Harper v. Virginia State Board of Elections*, 86 Sup. Ct. 1079, 1083 (1966).

Shortly after the oral arguments had been heard in the *Labat* case, a state supreme court within the circuit announced its decision on precisely the same issue.<sup>49</sup> The Florida Supreme Court unanimously threw out a lower court conviction on the grounds that the intentional and systematic exclusion of common laborers as a class in making up the jury list had violated the fourteenth amendment. The Florida high court even quoted from the *Thiel* case in illustrating its reasoning. Yet, the Florida decision is nowhere mentioned in *Labat*. Perhaps propriety prohibits reliance on a case not mentioned by counsel on either side. But, it is suggested, the Florida decision could not have passed unnoticed nor without considerable persuasive impact.

The decision in this case appears to serve both society's interest in due process and the party's interest in equal protection. "The injury [of systematic exclusion] is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."<sup>50</sup> The decision fosters widespread participation in the governmental process, for "jury service is a form of participation in the processes of government, a responsibility and a right that should be shared by all citizens. . . ."<sup>51</sup> More inclusive participation will have the demonstrative effect of justice not only being done, but also being seen to be done. "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."<sup>52</sup> Given this tradition, society should be on guard against the jury's "losing its democratic flavor and becoming the instrument of the select few."<sup>53</sup> And, as was pointed out in the *Thiel* case, "a blanket exclusion of all daily wage earners . . . must be counted amongst those tendencies which undermine and weaken the institution of jury trial."<sup>54</sup>

Assuming the value of safeguarding juries from practices of deliberate exclusion, what are the available enforcement devices? Cases have held that mandamus is a proper remedy for citizens to compel jury commissioners to desist from exclusion and to make up the jury list as provided by law.<sup>55</sup> But mandamus, as an effective safeguard against jury exclusion, is probably more apparent than real. For jury exclusion is a subtle, low-visibility wrong, which the community is probably not attuned to recognize. A more effective alternative would be to let a defendant challenge the jury if he believes systematic exclusion to be practiced. As the law now stands, this alternative is constitutionally available only if the defendant is of the "same class" as those excluded.<sup>56</sup>

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<sup>49</sup>*Simmons v. State*, 182 So. 2d 442 (Fla. 1966).

<sup>50</sup>*Ballard v. United States*, 329 U.S. 187 (1946).

<sup>51</sup>*White v. Crook*, 251 F. Supp. 401 (D.C. Ala. 1966).

<sup>52</sup>*Smith v. Texas*, 311 U.S. 128 (1940).

<sup>53</sup>*Moore v. New York*, 333 U.S. 565 (1948) (dissent).

<sup>54</sup>*Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1945).

<sup>55</sup>*E.g.*, *Davis v. Arthur*, 139 Ga. 74, 76 S.E. 676 (1912). *Contra*, *State ex rel Passer v. County Board of Renville County*, 171 Minn. 177, 213 N.W. 545 (1927).

<sup>56</sup>*Griffin v. State*, 183 Ga. 775, 190 S.E. 2 (1937); *Haraway v. State*, 203 Ark. 912, 159 S.W.2d 733 (1942); *State v. Jones*, 44 Del. 372, 57 A.2d 109 (1947).

Such seems an especially haphazard means of protecting society's substantial interest in the integrity of the jury system.

However, there appears to be an impending trend toward relaxation of the "same class" constraint. A Georgia court relaxed the constraint, observing, "The exclusionary practice condemned by the Fourteenth Amendment does not depend on the exclusion from juries of a group to which the defendant belongs or identifies himself, but on the resulting failure of the jury to represent a cross-section of the community."<sup>57</sup> More recently the Maryland Supreme Court held that a theist had standing to challenge the statutory exclusion of non-theists from the jury that tried and convicted him.<sup>58</sup> In the same extraordinary en banc session at which the principal case was argued, the Fifth Circuit also heard *Rabinowitz v. United States*<sup>59</sup> challenging the "same class" rule. In a lengthily reasoned decision, the Fifth Circuit—recognizing the widely-shared interest in a representative jury—allowed a non-member of the group excluded to lodge the challenge.

This expansion of standing to challenge—beyond just parties coincidentally members of the group excluded—is a trend of great promise in the administration of justice.

Donald R. Stacy

#### CRIMINAL LAW—CRIMINAL RESPONSIBILITY IN THE FEDERAL COURTS

Exculpation from prosecution because of a lack of criminal responsibility has long been a perplexing problem for the bar and judiciary. The American Law Institute Model Penal Code states that "no problem in the drafting of a penal code presents larger intrinsic difficulty than that of determining when individuals whose conduct would otherwise be criminal ought to be exculpated on the ground that they were suffering from mental disease or defect when they acted as they did."<sup>1</sup> The requirements or tests of criminal responsibility are many and varied and are a constant source of confusion for all who come in contact with them. This note outlines the several tests now used in federal courts of appeals and shows how the law is beginning to change in outlook on criminal responsibility.

In the recent case of *United States v. Freeman*<sup>2</sup> federal agents, using informants, bought narcotics from the appellant on two occasions. Following the second purchase the agents made an arrest and subsequently obtained convictions on two counts under the Narcotic Drug Import and Export Act.<sup>3</sup> The trial defense consisted of allegations that

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<sup>57</sup>Allen v. State, 110 Ga. App. 56, 59, 137 S.E.2d 711, 713 (1964).

<sup>58</sup>State v. Madison, 240 Md. 265, 213 A.2d 880 (1965).

<sup>59</sup>366 F.2d 34, 37 (5th Cir. 1966).

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<sup>1</sup>MODEL PENAL CODE § 4.01, Comment (Tent. Draft No. 4, 1955).

<sup>2</sup>357 F.2d 606 (2d Cir. 1966).

<sup>3</sup>21 U.S.C. §§ 173, 174.

the accused did not possess sufficient capacity to be held responsible for his acts. His condition resulted from long use of impure drugs and alcohol. The trial court, on the basis of the *M'Naghten* rule, found the accused criminally responsible for his acts. The Second Circuit Court of Appeals reversed the conviction and employed a new criterion for determining criminal responsibility. The court adopted the American Law Institute Model Penal Code section 4.01 as a standard for determination of criminal responsibility and rejected the *M'Naghten* rule. Section 4.01 provides that a person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. The Model Penal Code suggests the use of the word "wrongfulness" in place of "criminality." The court adopted this suggestion.

The test of criminal responsibility has been a target of criticism and a source of confusion since its promulgation in *Daniel M'Naghten's Case*<sup>4</sup> in 1843. The test stated that the accused, as a result of disease of the mind, must not know the nature and quality of his acts or, knowing the nature and quality of his acts, does not know his acts to be wrong. This basic rule remains the law in many jurisdictions today.<sup>5</sup> Other jurisdictions<sup>6</sup> have made additions to *M'Naghten's* rule by supplementing it with the irresistible impulse test. Some states have formulated a test by legislation,<sup>7</sup> but the majority take their tests from case law.

The Supreme Court of the United States appeared to state its test of criminal responsibility in the two *Davis v. United States* cases in 1895<sup>8</sup> and 1897<sup>9</sup> respectively. The cases placed the burden of proof on the prosecution to prove sanity once the defense of insanity was raised. The approved charge to the jury was that insanity meant a perverted and deranged condition of the mental faculties so that a person did not know right from wrong; or if he knew the act was wrong and could distinguish between right and wrong, his will had to be so completely destroyed that his actions were beyond his control.<sup>10</sup> These decisions still serve as a basis for the jury charge in many courts.<sup>11</sup> In *Hotema v. United States*<sup>12</sup> the term "irresistible impulse" came into being, and the court approved a jury charge using the expression. The court has not seen fit to substantially deviate from its position on the question of criminal responsibility, although several members of the court have

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<sup>4</sup>10 Clark & Fin. 200, 8 Eng. Rep. 718 (1843).

<sup>5</sup>*E.g.*, *Johnson v. State*, 223 Miss. 56, 76 So. 2d 841 (1955).

<sup>6</sup>*E.g.*, *Barbour v. State*, 262 Ala. 297, 78 So. 2d 328 (1955).

<sup>7</sup>MINN. STAT. ANN. § 610.10 (1963); VT. STAT. ANN. tit. 13 §§ 4801, 4802 (1959); N. Y. PENAL LAW § 1120.

<sup>8</sup>160 U.S. 469 (1895).

<sup>9</sup>165 U.S. 373 (1897).

<sup>10</sup>160 U.S. 469, 476 (1895).

<sup>11</sup>*E.g.*, *Sauer v. United States*, 241 F.2d 640, 642-45 (9th Cir. 1957).

<sup>12</sup>186 U.S. 413, 417 (1902).

expressed dissatisfaction with this position.<sup>13</sup> In *Leland v. Oregon*<sup>14</sup> the Court said that the advancement of the psychiatric sciences had not progressed far enough to require the elimination of the right-wrong test.

In the area of criminal responsibility the attitudes of the circuit courts of appeals are divergent. This split of opinion is occasioned by the fact that some circuits regard the test for criminal responsibility stated in the *Davis* cases as dicta, while others do not. The decision of the District of Columbia Circuit Court of Appeals in the famous *Durham v. United States*<sup>15</sup> case created a storm of controversy. The rule in that case stated that one is not criminally responsible if his act was the product of a mental disease or defect.<sup>16</sup> Actually the so-called new rule seems to be an adaptation and modernization of a New Hampshire rule in existence for some years.<sup>17</sup> The *Durham* rule has been followed in the District of Columbia since 1954.<sup>18</sup> However, it recently underwent modification in *McDonald v. United States*.<sup>19</sup> The modification stated that a mental disease or defect included any mental abnormality which substantially affects mental or emotional processes and substantially impairs behavior controls.<sup>20</sup> This modification of the *Durham* rule now closely parallels the provisions of the Model Penal Code.

The First Circuit continues to employ the *M'Naghten* rule. However, in *Amador Beltran v. United States*<sup>21</sup> the court recommended that the lower court give attention to *United States v. Currens*,<sup>22</sup> which held the jury must be satisfied that the accused committed the act as a result of a mental disease or defect and lacked substantial capacity to conform his conduct to the requirements of law. Thus, it seems the First Circuit would be receptive to a change in its test for determination of criminal responsibility.

The Second Circuit in a recent decision adopted the American Law Institute Model Penal Code section 4.01 as its test.<sup>23</sup> This is the first time the Model Penal Code, as promulgated, has been adopted in the federal courts. The Model Penal Code attempts to take into account many of the criticisms of *M'Naghten* and *Durham*. The Model Penal Code provides that a person is not responsible, if at the time of the com-

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<sup>13</sup>Brennan, *Law and Psychiatry Must Join in Defending Mentally Ill Criminal*, 49 A.B.A.J. 239 (1963); Douglas, *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists*, 41 IOWA L. REV. 485 (1956).

<sup>14</sup>343 U.S. 790, 800-01 (1952).

<sup>15</sup>214 F. 2d 862 (D.C. Cir. 1954).

<sup>16</sup>*Id.* at 874.

<sup>17</sup>See *State v. Pike*, 49 N.H. 399 (1870).

<sup>18</sup>*E.g.*, *Carter v. United States*, 252 F.2d 608 (1957); *Blocker v. United States*, 288 F.2d 853 (1961).

<sup>19</sup>312 F.2d 847 (D.C. Cir. 1962).

<sup>20</sup>*Id.* at 851.

<sup>21</sup>302 F.2d 48 (1st Cir. 1962).

<sup>22</sup>290 F.2d 751 (3d Cir. 1961).

<sup>23</sup>*United States v. Freeman*, 357 F.2d 606, 625 (2d Cir. 1966).

mitted act, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. The critical words of the Model Penal Code test are "substantial capacity" and "appreciate." *M'Naghten* requires there be no knowledge that the committed act is wrong, and impairment of the senses must be complete. The American Law Institute test calls for substantial impairment. This indicates that any incapacity, as under *Durham*, will not exculpate, while total incapacity, as under *M'Naghten*, is not a requirement for acquittal. The word "appreciate" provides the psychiatrist a larger degree of latitude in testifying as to the effect of the accused's mental state.<sup>24</sup> The Model Penal Code in supporting the substantial capacity terminology says that "the law must recognize that when there is no black and white it must content itself with different shades of gray."<sup>25</sup> The Model Penal Code rejects the product formula of the *Durham* rule, and excludes the psychopathic personality from the mental disease or defect concept.<sup>26</sup> Also excluded are abnormalities, the presence of which is shown only by repeated criminal and antisocial conduct.<sup>27</sup>

The Code is not without its disadvantages, weak points, and critics. The rule, with its substantial capacity requirements, leaves more room for question as to the mental state of the accused. However, somewhere a determination must be made as to what is or is not substantial capacity. This requires a yes or no answer by the expert witness and demands an unqualified answer to a question of cause and effect. This question can seldom be answered with a black and white answer.<sup>28</sup>

The wording of the test has been attacked as vague and ambiguous, particularly the phrase "substantial capacity." The phrase to "appreciate the criminality" is not without criticism, for the concept of criminal responsibility requires a guilty mind as well as an unlawful act. If the accused cannot appreciate the criminality of his act, then it is not criminal, and if it is criminal, then he must have appreciated it. This seems inconsistent and could be as confusing as *M'Naghten*.<sup>29</sup>

The exclusion by the Code of the psychopathic personality and abnormalities shown only by repeated and antisocial conduct from the definition of mental disease or defect has met with some disfavor. These exclusions keep from the jury certain testimony which may be relevant as more is learned about various mental diseases.<sup>30</sup> The Code attempts to avoid a definition of disease or defect and thereby circumvents the problems of the *Durham* rule. This is done by excluding from the test disorders characterized only by disturbed behavior. One psychiatrist voiced his complaint by saying that "although the A.L.I. Rule may

<sup>24</sup>Allen, *The Rule of the American Law Institute's Model Penal Code*, 45 MARQ. L. REV. 494 (1962).

<sup>25</sup>MODEL PENAL CODE § 4.01, Comment (Tent. Draft No. 4, 1955).

<sup>26</sup>*Ibid.*

<sup>27</sup>*Ibid.*

<sup>28</sup>Cavanagh, *Problems of a Psychiatrist in Operating Under the McNaghten, Durham, and Model Penal Code Rules*, 45 MARQ. L. REV. 478, 487 (1962).

<sup>29</sup>*Ibid.*

<sup>30</sup>Moore, *McNaghten Is Dead—Or Is It?*, 3 HOUSTON L. REV. 58, 71 (1965).

have certain advantages over Durham and M'Naghten I am not sure that in this provision it does not become diagnostic and invade the area of psychiatric competence. Ultimately the decision of whether a disorder belongs in this group is going to depend on the psychiatric examination. It should probably be left there."<sup>31</sup> The main value of the test "is in its effort to clarify the status of the sociopath."<sup>32</sup>

The Third Circuit, with the *Currens*<sup>33</sup> decision, adopted new criteria for the determination of insanity. The test states that the jury must be satisfied that the accused committed the act as a result of a mental disease or defect and lacked substantial capacity to conform his conduct to the requirements of the violated law.<sup>34</sup> The court's idea of an acceptable jury charge was that the disease must have weakened the defendant's capacity to conform his conduct to the violated law's requirements, and he must have lacked substantial capacity to conform his conduct to the requirement of that law. Unless, in the jury's opinion, these standards could be met by the defendant, he could not be exculpated on the grounds of lack of criminal responsibility.<sup>35</sup>

The Fourth Circuit clings to *M'Naghten* under a 1915 decision.<sup>36</sup> Since the court has not faced the problem in fifty-one years, the court might be receptive to change in a seemingly rapidly changing area of the law.

In the Sixth Circuit, though the responsibility test is not explicitly stated, the general tone of *Pollard v. United States*<sup>37</sup> indicates the use of *M'Naghten* coupled with the irresistible impulse.

The Seventh Circuit does not seem to have a direct ruling on the test for criminal responsibility. However, the direction seems to be toward the use of *M'Naghten's* rule from the opinion written in *United States v. Westerhausen*<sup>38</sup> and *United States v. Cain*.<sup>39</sup>

The Eighth Circuit uses as its test *M'Naghten's* rule supplemented by irresistible impulse.<sup>40</sup> To convict, it is necessary that there be positive findings as to the accused's cognition, violation, and capacity to control his behavior.<sup>41</sup> The court rejected the *Durham*, *Currens*, and American Law Institute tests. This position was affirmed in *Carter v. United States*.<sup>42</sup>

<sup>31</sup>Cavanagh, *Problems of a Psychiatrist in Operating Under the McNaghten, Durham, and Model Penal Code Rules*, 45 MARQ. L. REV. 478, 491 (1962).

<sup>32</sup>*Id.* at 493.

<sup>33</sup>*United States v. Currens*, 290 F.2d 751 (3d Cir. 1961).

<sup>34</sup>*Id.* at 774.

<sup>35</sup>*Id.* at 775.

<sup>36</sup>*Perkins v. United States*, 228 Fed. 408 (4th Cir. 1915).

<sup>37</sup>See 282 F.2d 450 (6th Cir. 1960), *mandate clarified*, 285 F.2d 81 (6th Cir. 1960).

<sup>38</sup>See 283 F.2d 844 (7th Cir. 1960).

<sup>39</sup>See 298 F.2d 934 (7th Cir. 1962), *cert. denied*, 370 U.S. 902 (1962).

<sup>40</sup>*Feguer v. United States*, 302 F.2d 214 (8th Cir. 1962), *cert. denied*, 371 U.S. 872 (1962).

<sup>41</sup>*Id.* at 245.

<sup>42</sup>332 F.2d 728 (8th Cir. 1964), *cert. denied*, 84 Sup. Ct. 1353 (1965).

In *Sauer v. United States*<sup>43</sup> the Ninth Circuit continued to use *M'Naghten's* rule supplemented by irresistible impulse. While affirming the use of *M'Naghten's* rule the court expressed dissatisfaction with the test<sup>44</sup> but stated it was bound by the *Davis* cases and only the Supreme Court or Congress could institute a change.<sup>45</sup>

In *Wion v. United States*<sup>46</sup> the Tenth Circuit put forth the test that before the accused can be found guilty, he must be mentally capable of (1) knowing what he was doing, (2) knowing it was wrong, and (3) controlling his conduct.<sup>47</sup> In the decision the court rejected the *Currens* rule and approved a jury charge which consisted basically of the Model Penal Code supplemented by the above three findings.<sup>48</sup>

In summary the United States circuit courts of appeals, excluding the Fifth Circuit, which will be discussed later, can be grouped as follows. The District of Columbia, Third, and Tenth Circuits follow a rule which closely parallels the Model Penal Code. The First, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits continue to use *M'Naghten's* rule or the *M'Naghten* rule coupled with irresistible impulse. The circuits breaking away from *M'Naghten's* rule seem to say the *Davis* cases are not the law relating to insanity, but dicta. The remainder cite *Davis* as controlling their decisions.

The Fifth Circuit continues to employ the basic *M'Naghten* or right-wrong test to determine criminal responsibility. Beginning with *Lee v. United States*<sup>49</sup> the court said that "to be available as a defense the insanity of the accused must be such as to deprive him of mental capacity to distinguish between right and wrong."<sup>50</sup> In *Howard v. United States*<sup>51</sup> the court faced the issue of instituting a new test for criminal responsibility. The court refused to follow the *Durham* rule, saying it was bound by the Supreme Court decision in *Davis*.<sup>52</sup> In *Argent v. United States*<sup>53</sup> the court affirmed the position taken in *Howard* by saying: "This Circuit, en banc, has adhered to the burden of proof rule established in the first *Davis* case, and the test of criminal responsibility approved in the second *Davis* case."<sup>54</sup>

The affirmance of the accused's conviction in *Carter v. United States*<sup>55</sup> was by an equally divided court. In reality it brought no new law into existence nor did it set up any new guidelines for tests of criminal responsibility. It merely re-affirmed the positions taken by the

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<sup>43</sup>241 F.2d 640 (9th Cir. 1957), *cert. denied*, 354 U.S. 940 (1957).

<sup>44</sup>*Id.* at 644-45.

<sup>45</sup>*Id.* at 652.

<sup>46</sup>325 F.2d 420, 427 (10th Cir. 1963), *cert. denied*, 377 U.S. 946 (1964).

<sup>47</sup>*Id.* at 430.

<sup>48</sup>*Ibid.*

<sup>49</sup>91 F.2d 326 (5th Cir. 1937), *cert. denied*, 302 U.S. 745 (1937).

<sup>50</sup>*Id.* at 330.

<sup>51</sup>232 F.2d 274 (5th Cir. 1956).

<sup>52</sup>*Id.* at 275.

<sup>53</sup>325 F.2d 162 (5th Cir. 1963).

<sup>54</sup>*Id.* at 171.

<sup>55</sup>325 F.2d 697 (5th Cir. 1963), *cert. denied*, 377 U.S. 946 (1964).

court in *Howard* and *Argent*. However, some of the language in the dissenting opinions seems to suggest that at least part of the court would consider re-evaluating their position if the question were put squarely before them. Mr. John R. Moore, Jr., Atlanta attorney, lecturer in law, lecturer in forensic psychiatry, and Carter's attorney expresses the following thoughts on the Fifth Circuit's position:

Appointed counsel at the trial while offering their own suggestions, in effect attempted to put the burden on the court to formulate a rule applicable to the facts of the case. . . . One might well expect an appellate court to rule on such a point of error only when alternative charges have been presented to the trial court. The lesson would seem to be to request a charge in the familiar terms of rules in effect in other circuits or, better still, to fit one to the peculiar facts of the case at hand. An assignment of error on the failure so to charge might well persuade the Fifth Circuit to take another look at the problem. . . . The Fifth Circuit appears to be coming to the same conclusion reached by the Eighth Circuit. . . .<sup>56</sup> The Fifth Circuit seems willing and anxious to break away from the "right and wrong" terminology. Given the proper case and proper trial procedures, it appears certain that it will do so.<sup>57</sup>

It is submitted that the Fifth Circuit will change its views on the test for criminal responsibility in the future. The prime question, in view of the existing tests, is which one to use. The *M'Naghten* test is antiquated, having been in existence since 1843. In light of advancements, both technically and socially, of the past fifty years, surely a judge-made English rule 120 years old is lacking in its application to today's problems. The *Durham* rule has been rejected by the Fifth Circuit<sup>58</sup> and does not appear likely to gain favor in the future. Perhaps the *Durham* rule would be more acceptable if a workable and reliable definition of the "product of a mental disease or defect" formula were devised. It is submitted that the American Law Institute test presents no significant advancement. The test still includes a concept of right and wrong by reference to the requirements of law. The use of the "substantial capacity" test seems to be a mere putting in black and white what in reality juries have been doing for years. The "conforming behavior to the requirements of law" portion of the American Law Institute test seems to be a mere extension of irresistible impulse clothed in a veil of semantics. Much has been written about the law of criminal responsibility, but since *M'Naghten*, little has been done about it. Many high sounding and confusing instructions have been given and more equally confusing academic solutions offered. It ap-

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<sup>56</sup>*Dusky v. United States*, 271 F.2d 385 (8th Cir. 1959), *rev'd on other grounds*, 362 U.S. 402 (1960), *aff'd on rehearing*, 295 F.2d 743, 759 (8th Cir. 1961).

<sup>57</sup>Moore, *M'Naghten is Dead—Or Is It?*, 3 HOUSTON L. REV. 58, 72-74 (1965).

<sup>58</sup>*Howard v. United States*, 232 F.2d 274 (5th Cir. 1956).

pears that in the end the plain common sense of the average juror comes up with the answer regardless of the confusion existing in the legal world. Perhaps the best solution is "to write these standards in understandable English. . . ."<sup>59</sup> This could be accomplished by letting the expert witnesses have complete freedom in testifying as to the accused's mental state and history and its effects on his actions. The instructions should then charge that if from the testimony the jury believes the accused was insane or could not justly be convicted, he should be exculpated. An instruction of this type would eliminate the semantical niceties of previous tests, and allow the jury to do with sanction what they have been doing on their own for years.

*Luther M. Thompson*

INSURANCE—DISCLOSURE OF LIABILITY INSURANCE COVERAGE  
AS GROUNDS FOR MISTRIAL

It is the general rule in Mississippi,<sup>1</sup> as it is in most jurisdictions,<sup>2</sup> that any action on the part of a plaintiff tending to show that a defendant is insured against liability is improper and is grounds for mistrial. The unrealistic bases of the rule and the impracticalities of its application, which have been criticized with increasing frequency, seem to have been dealt with effectively in other jurisdictions. In light of these facts, it is timely to evaluate the present state of Mississippi law on the question.

It was held in the early case of *Herrin v. Daly*<sup>3</sup> that a showing of a defendant's liability insurance coverage is inadmissible. The rule in the case has been repeatedly followed. In the case of *Scott County Co-op v. Brown*,<sup>4</sup> the Mississippi Supreme Court found the following statement to be "highly prejudicial:" "And gentlemen, in all deference to Scott County, I believe you have confidence in us lawyers to know that we will collect a judgment in such a way as to not hurt the defendants. . . ."<sup>5</sup> The court said that the only purpose and effect of the statement was to inform the jury that someone other than the defendants would satisfy the judgment. Such a statement was tantamount to saying that the defendant was covered by liability insurance. In *Odom v. Walker*<sup>6</sup> the court held that it was grounds for mistrial for a prospective juror, on voir dire examination, to mention in the presence

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<sup>59</sup>*Carter v. United States*, 325 F.2d 697, 708 (5th Cir. 1963).

<sup>1</sup>See *Herrin v. Daly*, 80 Miss. 340, 31 So. 790 (1902).

<sup>2</sup>See *Watson v. Adams*, 187 Ala. 490, 65 So. 578 (1914).

<sup>3</sup>80 Miss. 340, 31 So. 790 (1902).

<sup>4</sup>187 So. 2d 321 (Miss. 1966).

<sup>5</sup>*Id.* at 324.

<sup>6</sup>193 Miss. 862, 11 So. 2d 452 (1943).

of other jurors that he had heard about a man suing the defendant and an insurance company. In *M & A Motor Freight Lines, Inc. v. Villere*<sup>7</sup> prejudicial error was found when a motion for mistrial was overruled after plaintiff's counsel had extracted a reference to insurance from a defense witness.

In the case of *Whatley v. Boolas*<sup>8</sup> the plaintiff's counsel elicited from his own witness the fact that a man who took statements from witnesses after an automobile accident was a representative of an insurance company. The court found this to be improper and ordered a new trial. In the *Daly* case, plaintiff's counsel, during cross-examination, asked the defendant if there was anyone back of his firm who would satisfy a judgment. The court said that the question could not conceivably throw any light on the issue and could have no effect but to seduce a verdict on the ground that an insurance company, and not the defendants, would be affected.<sup>9</sup> This statement by the court is descriptive of the two major bases for the general rule of inadmissibility: first, the fact that a defendant carries insurance against liability is irrelevant in determining liability; and second, that juries, if armed with the information that a defendant was insured against liability, would disregard the high place their function has in our system and would award verdicts based only on the knowledge that insurance companies are able to bear financial loss. The first reason is manifestly accurate, but the validity of the second is questionable. Assuming, arguendo, that juries do become prejudiced in favor of plaintiffs when they learn that defendants have insurance against liability, it follows that any injection of insurance is prejudicial. Yet, in Mississippi, as in most jurisdictions,<sup>10</sup> there are recognized exceptions to the general rule. One important exception is the procedural right of the plaintiff to determine whether a prospective juror might be biased because of insurance connections. In *Yazoo City v. Loggins*<sup>11</sup> the Mississippi Supreme Court held that the plaintiff had the right to question jurors as to their possible insurance interest so long as the questioning was done in good faith. The court in *Avery v. Collins*<sup>12</sup> seriously limited the unrealistic approach of the *Loggins* case by directing that a determination of whether any prospective juror had insurance interests should be made in an indirect manner. In that opinion the court said:

[T]he proper means of ascertaining the qualifications of a tendered juror in respect to his insurance connections is to ask him what business he is engaged in, and if he answers, for instance, that he is a farmer, then the further precautionary question may be put to him whether he has any other business

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<sup>7</sup>190 Miss. 848, 1 So. 2d 788 (1941).

<sup>8</sup>180 Miss. 372, 177 So. 1 (1938).

<sup>9</sup>80 Miss. 340, 342, 31 So. 790, 791 (1902).

<sup>10</sup>See, e.g., *Vredenburg Saw Mill Co. v. Black*, 251 Ala. 302, 37 So. 2d 212 (1948).

<sup>11</sup>145 Miss. 793, 110 So. 833 (1926).

<sup>12</sup>171 Miss. 636, 157 So. 695 (1934).

or business connections, and, if he answers that he has not, that ought to end the privilege so far as inquiry into his insurance connections are concerned.<sup>13</sup>

Although this language limits the privilege of questioning jurors as to their insurance interests more than is the case in other jurisdictions,<sup>14</sup> it is obvious that a prospective juror, when asked in what business he is engaged, might answer that he is in the general insurance business. If he is then excused, a subtle hint has reached the prospective jury that insurance is involved in the case, and under the terms of *Avery v. Collins*, there would be no grounds for mistrial.

Another important exception to the general rule is the right of the plaintiff to test the bias of adverse witnesses. The court in *Mississippi Ice & Utils. Co. v. Pierce*<sup>15</sup> said: "If counsel, in good faith, on cross-examination, seeks to elicit the interest, bias, or prejudice of a witness by a proper question, he will not be precluded from doing so simply because the answer may reveal that a liability insurance company is interested."<sup>16</sup> In this case the witness did not represent an insurance company, but the court found that the question pertaining to whether the witness did represent the insurance company was not grounds for reversal, because the plaintiff earlier had told his counsel that the witness did represent the insurance company. Thus the question was asked in good faith.

Other exceptions have been made to the general rule. In one instance the court found it proper to show that an employer carried liability insurance on an automobile operated by an employee because of a dispute as to the existence of an employer-employee relationship.<sup>17</sup> Other exceptions have been made where plaintiff's counsel injected the question, but defendant's counsel later elaborated on it;<sup>18</sup> where plaintiff's counsel first introduced the subject but the defendant later disclosed that she had made a report to her insurance agent;<sup>19</sup> and where defendant's counsel elicited from a plaintiff's witness the statement that insurance adjusters had made the measurements involved in the case.<sup>20</sup>

By force of these exceptions and the general rule of inadmissibility, Mississippi courts are confronted with rules of evidence which lead to opposite results. An injection of insurance is either prejudicial or it is not, yet the rule does not apply uniformly. One area illustrating the lack of uniform application is where the subject of insurance is neither elicited by counsel, nor mentioned during voir dire, nor referred to in an opening or closing argument, but is injected by an inadvertent, unsolicited, or voluntary statement of a witness. The rule by weight of

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<sup>13</sup>*Id.* at 650, 157 So. at 699.

<sup>14</sup>See, e.g., *Parker v. Bryan*, 96 Ga. App. 283, 99 S.E.2d 810 (1957).

<sup>15</sup>161 Miss. 252, 134 So. 164 (1931).

<sup>16</sup>*Id.* at 264, 134 So. at 167.

<sup>17</sup>*Luke Constr. Co. v. Jernigan*, 252 Miss. 9, 172 So. 2d 392 (1965).

<sup>18</sup>*Peterman v. Gary*, 210 Miss. 438, 49 So. 2d 828 (1951).

<sup>19</sup>*Chilcutt v. Keating*, 220 Miss. 545, 71 So. 2d 472 (1954).

<sup>20</sup>*Lancaster v. Lancaster*, 213 Miss. 536, 57 So. 2d 302 (1952).

authority is that if a question is asked, the answer to which would be proper evidence, the fact that an unresponsive or inadvertent answer contains a reference to insurance will not be sufficient grounds for a mistrial.<sup>21</sup> The question of whether such a statement is grounds for mistrial was first presented to the Mississippi Supreme Court in *City of Jackson v. Reed*,<sup>22</sup> and apparently has not been dealt with since. In that case one of the plaintiff's witnesses was asked by plaintiff's counsel if he had signed a statement for one of the defense lawyers. The witness replied that he had not, but that he had been asked to sign something for an insurance man. The court said that this statement would not be grounds for mistrial since it would be difficult to determine whether the answer led the jury to believe that the defendant was covered by liability insurance.<sup>23</sup> This language suggests that the only circumstance where a mention of insurance coverage by an unsolicited or inadvertent statement of a witness will not be grounds for mistrial is where it is uncertain whether the statement revealed to the jury that a defendant had insurance coverage. Such a rule seems to leave lower court jurists with a concept which gives little notice as to whether a discretionary determination that such a statement has not inflamed the jury will be grounds for reversal. Whether or not the language of the *Reed* case is the cause, the lower courts are not uniform in their opinion of what the law is on the question.<sup>24</sup>

For purposes of discussion, it has been assumed that juries, upon learning that a defendant has insurance against liability, will become prejudiced in favor of the plaintiff and will return verdicts affected by their knowledge that insurance is involved. The better question, however, is whether most juries do not already know or presume that the defendant is insured, not whether juries become prejudiced when insurance is injected into the trial. The great majority of the cases in which the question of liability insurance is involved are automobile accident cases.<sup>25</sup> In Mississippi it is reasonable to assume that all automobile owners are insured against liability because of the Motor Vehicle Safety Responsibility Act.<sup>26</sup> When the rule against disclosure of insurance originated, the possibility of a defendant's having insurance was relatively small, and a "closed mouth" policy could be effective. But when consideration is given to the ways in which insurance may be properly injected into a trial, and to the fact that insurance has become common rather than exceptional, it seems likely that in most cases the jury will either be informed or will assume that the defendant has liability insurance.

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<sup>21</sup>*Williams v. Consumers' Co.*, 352 Ill. 51, 185 N.E. 217, 219 (1933).

<sup>22</sup>233 Miss. 280, 102 So. 2d 342 (1958).

<sup>23</sup>*Id.* at 301, 102 So. 2d at 350-51.

<sup>24</sup>The Mississippi circuit judges were asked the following question: Is an unsolicited, voluntary, or inadvertent mention of insurance by a plaintiff or plaintiff's witness generally grounds for mistrial? Seventeen of the twenty-one judges replied. The answers are grouped in the following categories: Yes, 6; no, 6; generally, no, 3; unsolicited and voluntary, yes, 1; inadvertent, no, 1.

<sup>25</sup>Annot., 4 A.L.R.2d 764 (1949).

<sup>26</sup>Miss. CODE ANN. § 8285-05 (1956).

Some jurisdictions have tried to produce reasonable results within the framework of the rule. In *Odegard v. Connolly*<sup>27</sup> the Minnesota court, after stating that any person fit to be a juror knows that most people carry liability insurance, said that so long as the fact of insurance is not featured or made the basis at the trial for an appeal to increase or decrease the damages, the information would seem to be without prejudice. A later court, in the case of *Anderson v. Enfield*,<sup>28</sup> added some substance to the statement in *Connolly* by saying that a mistrial would not be proper except in cases where the defendant's insurance coverage was repeatedly emphasized and featured in the questioning of witnesses, or in the closing argument of counsel.

One of the most objectionable qualities of the general rule as applied in Mississippi, is that in almost every instance an injection of insurance by the plaintiff or his counsel will, automatically upon proper motion, result in a mistrial. The Tennessee courts have dealt with this problem in a way which is effective to a certain extent. In *Seals v. Sharp*<sup>29</sup> the court said that the state is interested in repose of litigation, and if it is clear that justice has been done and that another trial would result in the same verdict as did the former trial, the trial judge may refuse to grant a motion for mistrial even though insurance may have been injected into the case.

If most juries either know or assume that defendants in personal injury cases are insured against liability, there is little reason to leave our courts struggling with the lack of uniformity inherent in the rule. Louisiana has adopted a so-called "direct action" statute which seems to deal with the problem in the most realistic manner. The Louisiana statute reads in part:

The insured person or his or her survivors or heirs . . . shall have a right of direct action against the insurer within the terms and limits of the policy . . . , and said action may be brought against the insurer alone or against both the insured or insurer jointly and in solido, at the domicile of either or principal place of business in Louisiana.<sup>30</sup>

This statute, by allowing direct suit against the insurer, eliminates the problem involved in applying the general rule of inadmissibility to practical circumstances. Perhaps the strongest argument for allowing the insurance company to be joined in a suit, or to be sued directly, is the long-established principle that the litigating parties, the court, and the jury are entitled to know who the real parties in interest are.<sup>31</sup> The typical insurance policy provides that the insurer has the exclusive right to employ counsel, defend the suit, and control the de-

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<sup>27</sup>211 Minn. 342, 1 N.W.2d 137 (1941).

<sup>28</sup>244 Minn. 474, 70 N.W.2d 409 (1955).

<sup>29</sup>31 Tenn. App. 75, 212 S.W.2d 620 (1948).

<sup>30</sup>LA. REV. STAT. § 22:655 (1950). Wisconsin allows direct suit of the insurance company in automobile accident cases. WIS. STAT. §§ 85.93, 260.11 (1951).

<sup>31</sup>MCCORMICK, EVIDENCE § 168 (1954).

cision as to settling or contesting the action.<sup>32</sup> It can hardly be said that when a defendant has an insurance contract containing such provisions that the insurer is not a real party in interest.

A direct action statute eliminates the problem of applying the general rule and its exceptions, but the jury still would be informed that insurance was involved. If the fear that juries with such knowledge will return biased verdicts is well founded, the direct action remedy would not be satisfactory. However, the court in *Mississippi Ice & Utils. Co. v. Pierce*<sup>33</sup> said, with reference to the possible prejudicial effect on the jury occasioned by an injection of insurance: "We must assume that the jurors were qualified persons of good intelligence, sound judgment, and fair character."<sup>34</sup> Additionally, if the insurance company is openly a party in a suit, the jury will probably make assumptions as to their capacity to pay. However, such assumptions are similar to those made concerning the capacity to pay of other corporations who may be parties of record.<sup>35</sup> And further, it has been submitted that since jurors may be expected to be owners of automobiles, they may be educated by suitable directions and arguments, to realize that reckless verdicts for excessive amounts or in unmerited cases will lead to an increase of local insurance rates. It is argued that jurors will realize that by acting irrationally, they will adversely affect their own interests.<sup>36</sup>

The enforcement of the rule of inadmissibility leads to constant evasion and quibbling, and thus to new trials for technical errors. It is doubtful whether in the end there has been any substantial gain to justice by following the rule's prohibitions. It seems that the gains to uniformity and realism which a direct action statute would bring would considerably outweigh any real or imagined losses.

Jesse R. Adams, Jr.

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<sup>32</sup>Jessup v. Davis, 115 Neb. 1, 211 N.W. 190, 194 (1927).

<sup>33</sup>161 Miss. 252, 134 So. 164 (1931).

<sup>34</sup>*Id.* at 264, 134 So. at 167.

<sup>35</sup>McCORMICK, EVIDENCE § 168 (1954).

<sup>36</sup>2 WIGMORE, EVIDENCE § 147 (3d ed. 1940).

## RECENT BOOKS

### Book Notes

**BASIC CORPORATE PRACTICE.** George C. Seward. Philadelphia, Pennsylvania: Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, 1966. Pp. 293. \$15.00.

Basic Corporate Practice is one of the ALI-ABA Practice Texts series. The book is a culmination of three less comprehensive paper-bound editions. This expanded edition does not concern itself with litigation of corporate issues. It begins with a section entitled "Is Incorporation Advisable?" and afterwards is concerned with the legal steps necessary to create and maintain the corporate entity. Each section is accompanied by the appropriate forms.

**MARITIME PERSONAL INJURIES, 2d Ed.** Martin J. Norris. Mount Kisco, New York: Baker, Vordhis & Co., Inc., 1966. Pp. 482.

Mr. Norris has compiled an extremely well documented volume. His coverage of Harbor Workers and their rights under maritime law is thorough, as is the coverage given "passengers and visitors." The book is useful to the practitioner, for it covers the steps necessary in effecting litigation as well as the applicable legal principles such as limitation of liability and actions for wrongful death. His coverage of the Longshoremen's and Harbor Worker's Compensation Act is logically organized and complete.

**MODERN BANKRUPTCY MANUAL.** Law and Practice, Editorial Staff of Publisher. San Francisco, Calif. Lawyers Co-Operative Publishing Co., Bancroft-Whitney Co., 1966. Pp. 2160. \$68.50.

This three-volume set is a complete work on bankruptcy law. It is thoroughly annotated and well indexed. It offers a comprehensive discussion of problems in the field, arranged in a logical "as they would present themselves" fashion. The appendix contains the text of the Bankruptcy Act and the Supreme Court's General Orders in Bankruptcy. The third volume is devoted to applicable forms. A thorough annotation of the forms facilitates their application to a fact situation. This work should prove of great assistance to any practitioner in the field.

**PATTERN AUTOMOBILE INTERROGATORIES.** Douglas Danner. Rochester, New York: Aqueduct Books, 1966. Pp. 650. \$25.00.

Mr. Danner has cataloged almost every conceivable situation in which one involved in a motor vehicle accident would wish to tender an interrogatory to his opponent. For each of these categories he suggests appropriate questions in appropriate form. The book is limited strictly to this function. It does not attempt to cover the substantive law involved or the advisability of using interrogatories in any given situation.

**THE NEW WAGE AND HOUR LAW,** Rev. Ed. Editorial Staff of Labor Relations Reporter. Washington, D.C.: The Bureau of National Affairs, Inc., 1967. Pp. 387. \$10.50.

The compilation first covers the changes effected by the 1966 amendment. It then covers in detail the extent of coverages and exemptions under the amended wage and hour law. The restrictions on child labor and the changes in administration and enforcement of the law are covered in less detail. Appendices include the text of the Fair Labor Standards Act and the committee's reports from both houses of Congress.

### **Books Received**

**PROBLEMS OF PROOF IN ARBITRATION.** Dallas L. Jones, editor. Washington, D.C.: The Bureau of National Affairs, Inc., 1967. Pp. 398. \$8.50.

**TREATISE ON JUSTICE.** Edgar Bodenheimer. New York, New York: Philosophical Library, Inc., 1967. Pp. 309. \$10.00.

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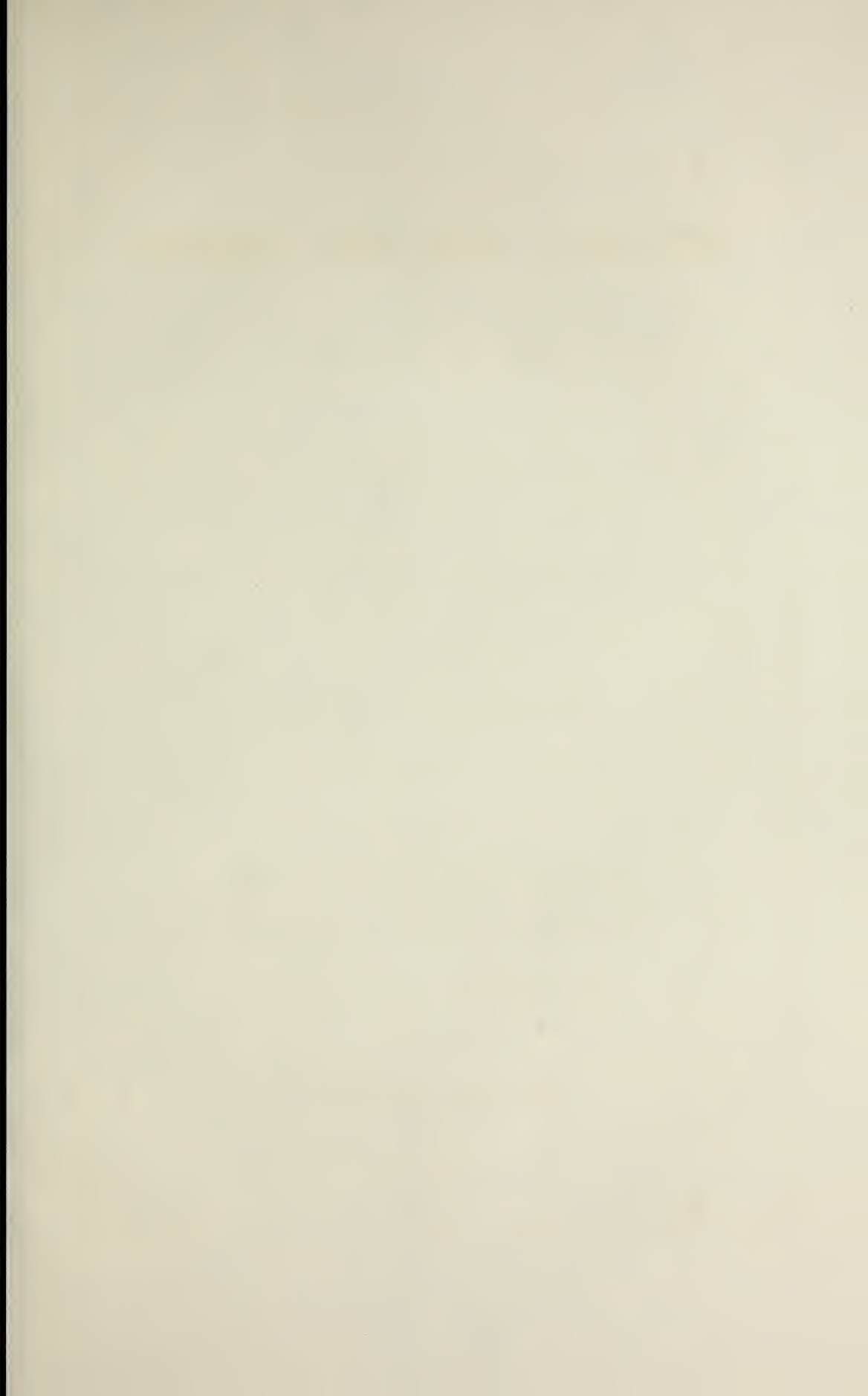
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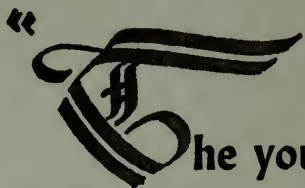
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